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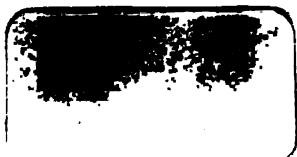
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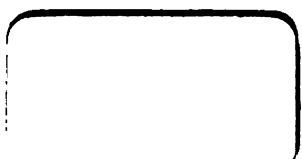
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

EASTER TERM, 11 GEO. IV.

TO

TRINITY TERM, 1 WILL. IV., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS:



BY

CHARLES CROMPTON, Esq., OF THE INNER TEMPLE,

AND

JOHN JERVIS, Esq., OF THE MIDDLE TEMPLE,

BARRISTERS AT LAW.



VOL. I.



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JUDGES
OF
THE COURT OF EXCHEQUER,


DURING THE PERIOD COMPRISED IN THIS VOLUME.



The Right Hon. Sir WILLIAM ALEXANDER, Knt., Lord Chief Baron.
The Right Hon. JOHN SINGLETON, Lord LYNDHURST, Lord Chief
Baron.



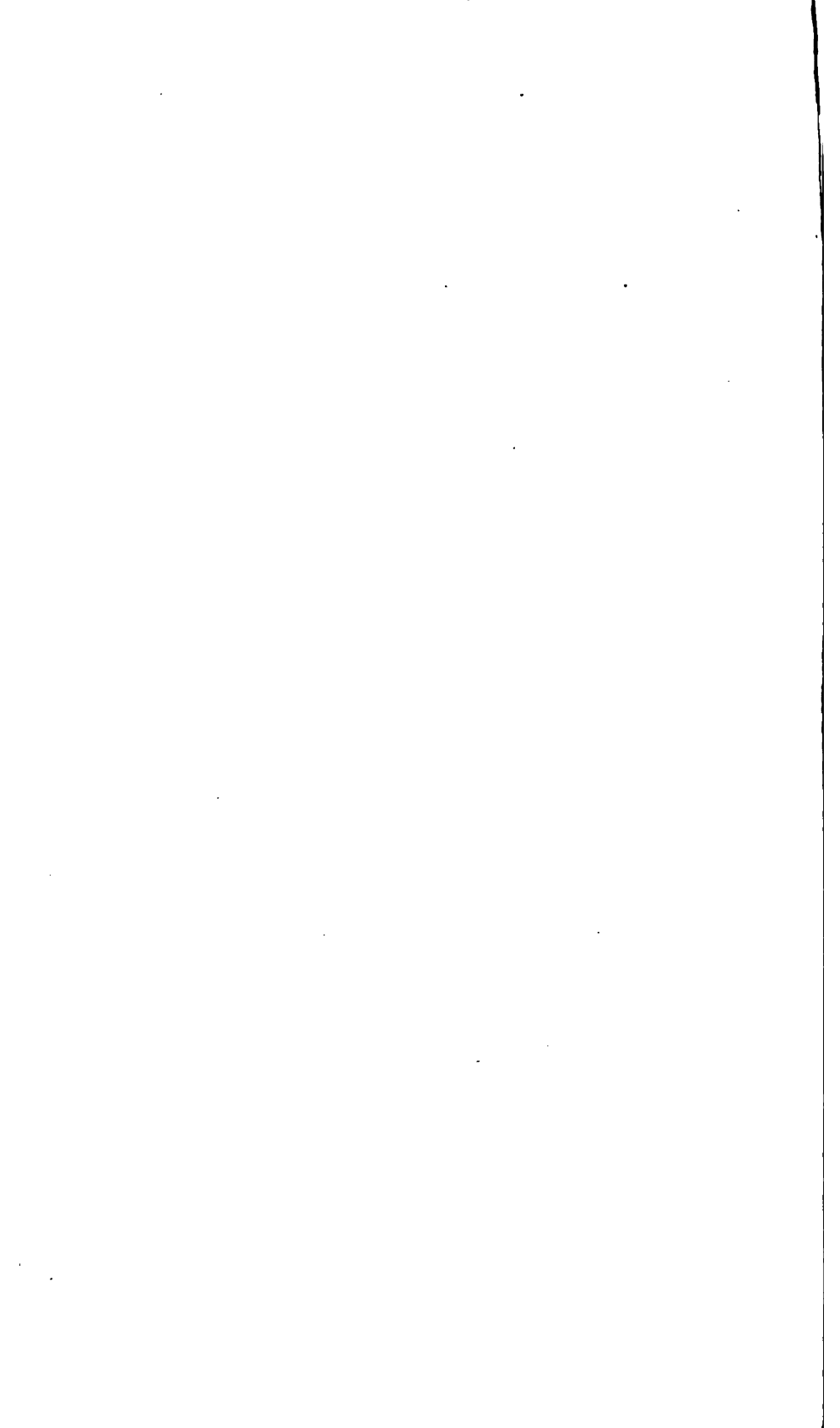
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Sir WILLIAM HORNE, Knt., Solicitor-General.



A

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EXCHEQUER OF PLEAS, EASTER TERM, 11 GEO. IV.

CHAPPLE V. DURSTON.

1830.

THIS was an action of debt upon a money bond, a promissory note, and the usual money counts. The defendant pleaded, amongst other things, to the count upon the bond, a set-off, and a similar plea to the other counts; to which the plaintiff replied that he was not indebted to the defendant *modo et formâ* as in those pleas was alleged.

The statute of limitations must be replied specially to a plea of set-off, and cannot be taken advantage of under the general replication of *nil debet*.

At the trial, before *Tindal*, C. J., at the Summer Assizes for the county of *Somerset*, 1829, it appeared that there was due to the plaintiff upon the bond, for principal and interest, the sum of 77*l.* 10*s.*, and that the plaintiff owed the defendant 20*l.* for rent due at Lady-day, 1822. The latter sum the defendant claimed to set off against the demand of the plaintiff; but the plaintiff contended that this debt was barred by the statute of limitations, and that he was entitled to take advantage of the statute, although he had not specially replied it. The

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Lord Chief Justice directed the Jury to find a verdict for the plaintiff, for 57*l.* 10*s.*, and gave the plaintiff leave to move to increase that verdict, should this Court be of opinion that he could take advantage of the statute under his general replication.

In pursuance of this leave, *Erle*, in *Michaelmas* Term last, obtained a rule, calling upon the defendant to shew cause why the verdict should not be increased by the sum of 20*l.*; against which

Erskine shewed cause. The statute of limitations does not destroy the debt, but merely bars the remedy; *Quantock v. England* (a); for if it did operate as an extinguishment of the debt, in no form of action need the statute be specially pleaded, and no promise without a fresh consideration would be sufficient to revive a debt of longer standing than six years. It is therefore a matter of law which does not go to the gist of the action, but to the discharge of it, and as such must be pleaded (b). Indeed it is admitted, that, in *assumpsit*, the statute of limitations must be pleaded; *Lee v. Rogers* (c); but a distinction, unfounded in principle, has been drawn between *assumpsit* and debt. Thus, in *Draper v. Glossop* (d), it was said, *per Holt*, C. J., "If the defendant plead *non assumpsit*, he cannot give in evidence the statute of limitations, because the *assumpsit* goes to the *præter tenses*; but upon *nil debet* pleaded the statute is good evidence, because the issue is joined *per verba de præsentis*, and without doubt *nil debet* by virtue of the statute; and it is no debt at this time, though it was a debt." The same rule was adjudged in an anonymous case reported in *Salkeld* (e), but these cases obviously proceed upon the notion, now exploded,

(a) 5 Bur. 2628; S. C. Bl. 702. Saund. 283, n. (2). *Duppav. Mayo*.

(b) B. N. P. 152.

(d) 1 Lord Raym. 153.

(c) 1 Lev. 110; see 1 Wms.

(e) 278.

that the statute of limitations destroys the debt; for, if the distinction between the præter and present tense were well founded, nothing could be given in evidence, under the plea of *non assumpsit*, which occurred subsequently to the promise; whereas, not only facts to shew that no such promise as that stated in the declaration was made, or that the promise was void at the time, by reason of duress, infancy, or coverture, but also facts to shew that no cause of action subsisted at the commencement of the suit, as accord and satisfaction, a release, and the like occurring after the promise, may be given in evidence under that plea. Expediency requires that the statute of limitations should be pleaded in debt equally as in *assumpsit*. The exceptions in the statute are alike applicable to both actions, and the plaintiff is equally liable to be surprised: In either case the statute does not extinguish the debt, but only takes away the remedy; and as in either case the defendant may insist upon the statute or waive it, if he intend to insist upon the statute he should plead it, to prevent surprise (a). Against the general application of this rule, the case of *Duppa v. Mayo* (b) does not militate. That case decided, that a plea of *nil debet infra sex annos* should conclude to the country; but that plea amounted to the general issue merely, the words *infra sex annos* being surplusage; because if the defendant owed nothing at the commencement of the suit, it was immaterial whether he had owed any thing at any other period within six years, and, if he was then indebted, it mattered not how long the debt had been due. By equitable construction, the statute of limitations has been applied to a set-off, and a debt barred by the statute cannot be set off; but as the defendant waives the statute by not pleading it, so does the plaintiff if the statute be not replied. The rule of expediency is equally applicable to a replication as to a plea, and the mere change

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(a) 1 Wms. Saund. 283, n. (2).

(b) 1 Saund. 282.

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of character between the parties can afford no solid distinction. A defendant is not bound to avail himself of his set-off, but may bring a cross action, in which case the statute must be pleaded: why then, if, to avoid circuity of action, the set-off be pleaded, should the defendant be placed in a worse situation than if he had sued for the amount. In a book of authority (a), it is said:—"A debt barred by the statute of limitations cannot be set off. If it be pleaded in bar to the action, the plaintiff may reply the statute of limitations. If it be given in evidence on a notice of set-off, it may be objected to at the trial." So, in *Remington v. Stevens* (b), it was held, that the statute of limitations may be replied to a plea of set-off. In legal construction the word "may" is here to be understood as "must;" for, if the statute be available at all against a set-off, it can only be subject to the same rules as if the set-off constituted the subject of a distinct action. This view is confirmed by the statute 9 Geo. 4, c. 14, s. 4, which places original demands and contracts alleged by way of set-off upon the same footing with respect to the statute of limitations.

Erle, contra.—The defendant is liable to be surprised by many defences that may be given in evidence under the general issue; and, even in criminal pleading, no notice is given to the defendant, by allegations which are held to be immaterial. Expediency is not, therefore, a safe ground of decision in this case. Referring to the words of the statute, and the earlier authorities, it would seem that in no case need the statute be pleaded, the debt being destroyed when more than six years old. *Brown v. Hancock* (c). However, in the action of *assumpsit* it has been decided, that the statute must be pleaded; but in debt there is no decision to that effect. On the contrary,

(a) B. N. P. 180.

(b) 2 Str. 1271.

(c) Cro. Car. 115.

although the modern practice may have been otherwise, the case of *Draper v. Glossop* (a), and the anonymous case in *Salkeld* (b), expressly shew that the statute of limitations may be given in evidence under the plea of *nil debet*. Upon this subject the opinion of Lord *Holt* is entitled to great consideration, sanctioned as it is by the authority of Lord Chief Baron *Comyns* (c), and the case of *Duppa v. Mayo* (d). But there is no case to shew that the statute must be replied to a plea of set-off; for the authorities referred to merely shew, that it may be replied; which will be true, although it may also be given in evidence under a general replication of *nil debet*. Were it otherwise, the plaintiff would be in a worse situation than if he were defendant to an action for the recovery of the subject of the set-off; for a defendant may plead several pleas, whereas one matter only can be replied.

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Cur. adv. vult.

VAUGHAN, B., now delivered the judgment of the Court as follows:—

This was an action of debt tried before the Lord Chief Justice of the Court of *Common Pleas* at the last Summer Assizes for the county of *Somerset*.

The first count of the declaration was upon a bond, dated 4th *March*, 1800, and conditioned for the payment of 150*l.*, with interest; the second count was upon a promissory note, and there were also added the common money counts.

The defendant pleaded to the first count on the bond, *non est factum, solvit post diem, solvit post diem* by the executors of the co-obligor, and a set-off; and, to the other counts, *nil debet*, the statute of limitations, and a set-off. Issues were joined on these several pleas; and to the pleas

(a) 1 Lord Raym. 153.

(b) 278.

(c) Com. Dig. Plead. (2 W 17.)

(d) 1 Saund. 282.

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of set-off, the common replication was filed, that the plaintiff was not indebted *modo et formâ* as in those pleas was alleged, concluding to the country.

Upon the trial of the cause, it was admitted by the defendant, that 50*l.* remained due upon the bond, together with interest thereon, from the year 1800, amounting to 77*l.* 10*s.* The defendant proved, that the plaintiff was indebted to him in the sum of 20*l.*, for rent, which became due at *Lady-day*, 1822, for certain premises occupied by the plaintiff under the defendant, and which he insisted ought to be deducted from the 77*l.* 10*s.* admitted to be due from him to the plaintiff upon the bond. The plaintiff, on the other hand, contended that, more than six years having elapsed since that debt accrued, the defendant's remedy for the recovery of it was barred by the statute of limitations, and that he was entitled to the benefit of that statute, under the common form of replication to the plea of set-off, without replying the statute of limitations specially.

The Lord Chief Justice of the *Common Pleas* seems to have been of opinion, that, as the plaintiff had not replied the statute of limitations to the plea of set-off, the defendant was entitled to set-off this sum of 20*l.*, although it was a debt which had accrued more than six years before the plea pleaded, and therefore directed the Jury to find their verdict for the plaintiff for 57*l.* 10*s.* only, reserving to the plaintiff the liberty to move to increase the verdict to the sum of 77*l.* 10*s.*, if this Court should be of opinion that he was entitled to the larger sum.

The question, therefore, reserved for the opinion of the Court upon this state of facts is, whether, to a plea of set-off, pleaded in an action of debt, the plaintiff is bound to reply the statute of limitations, or whether he may avail himself of the benefit of that statute, upon the common replication that he was not indebted *modo et formâ*, concluding to the country.

The case was ably argued by Mr. *Erle* for the plaintiff, and Mr. *Erskine* for the defendant, and many authorities were cited, which we have thought it our duty to examine; and which, after due consideration, have induced us to conclude, that the view taken of the question by the Lord Chief Justice of the *Common Pleas*, upon the trial of the cause, was the correct one: *viz.* that the plaintiff, having omitted to reply the statute of limitations to the plea of set-off, was precluded from availing himself of that statute as a bar to the defendant's cross demand.

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There are few acts of Parliament which have generated more controversy, and been productive of more litigation, than the statute 21 *Jac.* 1, c. 16, which was passed (as the preamble of it declares) for the purpose of quieting men's estates, and for the avoiding of suits.

The multiplicity of cases and the many contradictory decisions to be found in our Common Law Reports upon the construction of this statute, afford the strongest evidence of the inconvenience and mischief occasioned by a departure from the plain and literal sense of the act, and from too much refinement in construing its provisions. The third section enacts, that the different personal actions therein enumerated, shall be brought within the respective periods of time limited by that section, and not after. And in *Brown v. Hancock*, one of the earliest cases which occurred after the passing of the act, in the fourth year of the reign of *Charles* the 1st, and which is reported in *Cro. Car.* 115, the Court of *Common Pleas* held, that, if it appeared by the plaintiff's own shewing that the action was not brought within the limited time, or if the contract, whether in *assumpsit* or debt, were alleged to be within the time, and, upon *nil debet* or *non assumpsit* pleaded, it appeared in evidence that the *assumpsit* or contract was beyond the time, the action lies not, and the defendant shall take advantage thereof, if it be specially found by the Jury; for, the statute is in the negative, that he

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shall not maintain such action after the period limited by the statute had expired. But this decision was not long acted upon, for, in the following year, the Judges of the Court of *King's Bench* determined, upon error from the *Common Pleas*, in *Thursley v. Warren* (a), that the statute of limitations must be pleaded, although the declaration alleged both the promise and the breach of it to have been made more than six years before the commencement of the suit. The same point was determined in *Still v. Finch* (b), *Hopkins v. Bitthead* (c), *Lee v. Rogers* (d), and in *Gould v. Johnson* (e), which latter case came also by writ of error from the Court of *Common Pleas*. One of the errors assigned in that case was, that it appeared upon the declaration that the cause of action accrued more than six years before, and therefore it was not necessary to plead the statute. But the Court determined that the statute must be pleaded, that the plaintiff might have the opportunity of replying to such matter, for it may be that the original was sued within six years after the cause of action accrued.

A distinction seems to have been taken as to the form of pleading in *assumpsit* and debt, the authorities agreeing that, in *assumpsit*, the defendant must plead the statute, and conclude his plea with a verification, to give the plaintiff an opportunity of answering it, whereas in debt the defendant may give the statute in evidence under *nil debet* generally. The reason assigned by Lord *Holt* for this distinction is, that in debt upon *nil debet* pleaded the statute of limitations may be given in evidence, because it has made it no debt at the time of the plea pleaded, the words of which are in the present tense: but, in *assumpsit*, the statute of limitations cannot be given in evidence,

(a) Cro. Car. 160.

(b) Cro. Car. 281.

(c) Cro. Car. 404.

(d) 1 Lev. 110.

(e) Lord Raym. 838.

for it speaks of a time past, and relates to the time of making the promise. *Draper v. Glossop* (a), *Anon. cor. Holt*, C. J., at *Hertford*, 1690 (b).

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This rule, originating, as it should seem, in this decision of Lord *Holt*, has been incorporated into the admirable *Digest* of Lord Chief Baron *Comyns* (c), where, in enumerating the cases in which the defendant may plead the general issue *nil debet*, to debt upon contract, not upon bond, he says, "so, though the debt is barred by the statute of limitations, for he could not plead *nil debet infra sex annos*, but *nil debet* generally," and cites the case of *Draper v. Glossop*. It appears to us that this distinction savours more of ingenious refinement than of plain and practical good sense, and we conceive that the same rule would now be extended as well to actions of debt as of *assumpsit*, the same reasons for pleading the statute applying equally to both. If the statute is not pleaded, the plaintiff is liable to be surprised, and therefore equally unprepared to answer in the one action as in the other. In neither case does the statute extinguish the debt, but bars only the remedy, and it is optional whether the defendant will insist upon the statute or waive it. If he intends to insist upon it, he should plead it to prevent surprise, and if he does not, it should be presumed he intends to waive it. This is the view taken by the late Mr. Serjt. *Williams*, than whom a sounder lawyer, or more accurate special pleader has rarely done honor to his profession; and he states it to be very usual, and the modern practice, to plead to debt on simple contract, that the cause of action did not accrue within six years, that the plaintiff may reply, either that he was within any of the exceptions in the statute, or that he has sued out a writ within time, as is the common case in *assumpsit*.

(a) 1 Lord Raym. 153.

(b) 1 Salk. 278.

(c) Pleader (2 W 17.)

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Assuming, therefore, that there is no solid foundation for any distinction in the mode of pleading the statute of limitations, whether in debt or in *assumpsit*, the simple point to be considered is, whether, where a set-off is pleaded, the plaintiff, in order to avail himself of the statute, must reply it specially. It may be said, that this would impose a great hardship on the plaintiff, for as he cannot reply more than one matter, he would be placed in a worse situation than the defendant, who can plead the statute, and also, under the statute of *Ann.*, insist upon any other defence. Indeed, it has been suggested by Mr. *Starkie*, in his valuable practical treatise on the law of evidence, that it would be unreasonable that, in one and the same action, the defendant should be indulged in making several distinct answers to the plaintiff's claim, and yet that the plaintiff, in his answer to a counter claim, on the part of the defendant, should be confined to one only (a).

We have not been able to find any authority directly upon this point. In *Buller's Nisi Prius* (b), it is said, that if a debt, barred by the statute of limitations, be pleaded, the plaintiff may reply the statute. If it be given in evidence on notice, it may be objected to at the trial. This *dictum* of Mr. Justice *Buller* seems to have been founded upon the authority of a very short and loose note of the case of *Remington v. Stevens* (c), where it is reported to have been ruled, that the statute of limitations may be replied to a plea of set-off; but, in legal construction, we interpret the expression "may" imperatively, to mean "must."

A plea of set-off has ever been considered as in the nature of a cross-declaration; and, as it is clear, that if the defendant had sought to enforce his demand by assuming the character of plaintiff, the adverse party could have protected himself solely by pleading the statute; so, we

(a) 3 *Starkie*, 1318.

(b) 180.

(c) 2 *Stra.* 1271.

conceive, that the mere difference of the position of the names and characters of the parties upon the record, will not dispense with the necessity of introducing, by way of replication, the same substantive matter of defence to the counter demand. Nor can the hardship of this course of proceeding be with justice complained of, when it is remembered, that the plaintiff is at liberty to reply *nil debet* as to part of the defendant's cross-demand, and the statute of limitations to the residue. Upon the whole, it seems to us more consonant to the acknowledged rules of pleading, to determine that the statute of limitations ought, in this instance, to have been replied, and that, the plaintiff having omitted to do so, the verdict must stand, and this rule be discharged.

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Rule discharged (a).

A question arose respecting the costs of this application, which the plaintiff claimed as costs in the cause, and the defendant insisted that he was entitled to, as having succeeded in the motion. The Master certified that neither party would be entitled to the costs of this application without a special order of the Court, which, in this case, was not made.

(a) *Garrow*, B. who was absent on account of indisposition, concurred in the judgment of the Court.

The Lord Chief Baron was sitting in equity.

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SIDDON v. EAST.

An action of debt, for the penalty of 50*l.*, (given by the statute 32 *Geo.* 2, c. 28, for carrying a prisoner to gaol, on an arrest within twenty-four hours), against a revenue officer, acting under a warrant granted to him by the Sheriff by the directions of the solicitor of Excise, pursuant to the statute 7 & 8 *Geo.* 4, c. 53, s. 95, and founded upon an attachment for not appearing to an information filed in this Court for smuggling, may be removed from the Court of *Common Pleas* into the office of pleas of this Court.

THE plaintiff having refused to appear, pursuant to a *subpœna*, to an information filed against him in this Court for smuggling, an attachment was issued to take him for his contempt; whereupon the Sheriff, by the direction of the solicitor of Excise, in pursuance of the statute 7 & 8 *Geo.* 4, c. 53, s. 95 (a), granted his warrant to the defendant, an excise officer, who, by virtue thereof, arrested the plaintiff, and, before the expiration of twenty-four hours, carried him to prison. Under these circumstances the plaintiff brought an action against the defendant, in the Court of *Common Pleas*, to recover the penalty of 50*l.*, given by the statute 32 *Geo.* 2, c. 28, s. 12.

Walton, for the Crown, now moved (on notice) to remove the cause from the Court of *Common Pleas* into the office of pleas of this Court. The jurisdiction of this Court to remove, into the office of pleas, all cases touching the revenue of the Crown, cannot now be disputed; for the authority of this Court has been established by a uniform course of decisions (b). But it will be objected, that this is not a case affecting the revenue. The rule, however, is not confined to cases in which the revenue is in danger; for an officer of excise is entitled to this privilege, if he be impleaded in any other Court for an act done *virtute officii*. Thus, this Court has removed from the Court of *Common Pleas*, an action of trespass and false imprisonment against a revenue officer, for seizing, in the execution of his duty, the plaintiff's ship, upon suspicion of smuggling; and *Macdonald*, Chief Baron, said, that there could be no doubt about the mo-

(a) Which directs the Sheriff to grant his warrant in such case to a bailiff, appointed by the solicitor of the Excise.

(b) See 1 Anstr. 205, and note.

tion, the case being perfectly within the rule laid down by *Eyre*, Chief Baron, in the case of *Cawthorn v. Campbell* (a), arising, as it did, out of a transaction in the execution of the defendant's duty, as a revenue officer (b). By the provisions of the statute 7 & 8 Geo. 4, c. 53, s. 95, the defendant was an officer of the Excise for the purpose of executing this process, and the act complained of was done in the execution of his office. But it is a sufficient ground for this application, that the Crown may be incidentally affected. The Crown is bound to protect its officer, and a question may arise, how far the statute 32 Geo. 2, c. 28, is applicable to Crown process. This was ruled in a case referred to by *Eyre*, Chief Baron, in which an action was brought against the collector for *Bristol*, for money had and received for duties on glass. The collector had accounted for the duties to the *Exchequer*, and could never have drawn it back again, even though there had been a recovery against him, and yet the cause was removed to this Court; for, although the King's interest was not very directly touched, it was incidentally a question, whether the duties on glass were duties which were or were not to be paid.

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F. Pollock, contra.—By the statute 32 Geo. 2, c. 28, s. 12, any officer, offending against the provision of that statute, forfeits 50*l.*, to be recovered by action of debt, in any Court of record at *Westminster*. It is a remedy with which the King's revenue has no connection; and, although this Court has a general jurisdiction to remove any cause which may involve a question respecting the rights of the Crown, it has never yet gone the length now desired. The *Anonymous* case, cited from *Anstruther*, does not affect this question. There, the right of the officer to seize, and questions affecting the revenue of the Crown, must necessarily have arisen; but here, the plaintiff does not

(a) 1 Anstr. 205, n.

(b) *Anon.* 1 Anstr. 205.

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question the legality of the arrest, and only says, that the defendant has contravened the provisions of an Act of Parliament. The present case can no more fall within the rule as to the removal of causes, than if the defendant, in the course of executing the process, had beaten or slandered the plaintiff. No question as to the King's right can possibly arise. In *Cawthorn v. Campbell* (a), Lord Chief Baron *Eyre* enumerates four classes of persons entitled to this privilege, in the language of *Walter*, L. C. B. as follows:—"The causes of privilege in the *Exchequer* are, *first*, if one be informant for the King—*secondly*, if one be accountant to the King—*thirdly*, if one be debtor to the King—*fourthly*, where one is an officer of the Court, or attends an officer of the Court."—He then proceeds to state the nature of the privilege of each particular class:—"The debtor's privilege is to sue here, and nothing more; the accountant's privilege is to sue and be sued here, because he is immediately attendant upon his duty; the informer's privilege is a thing which I cannot venture to state precisely, for I do not quite understand what it was that Lord Chief Baron *Walter* meant by the informant's privilege; the privilege of the officer is also to be tried here in the office of pleas." But whatever may be the extent of the privilege, it is the privilege of the Crown, and not of the subject; and, in every case in which this Court has interfered, an interest has been shewn to exist in the Crown. It is not a personal privilege of the officers of the revenue, to be sued in this Court; but, in the language of the Lord Chief Baron, "the Court has always tied up the case in which they will grant this privilege of removing the action, to cases in which the action is brought for something which has been done by them in the execution of their office." The jurisdiction seems to have originated in a supposed contempt of the Court, in suing be-

(a) 1 Anstr. 209.

fore other tribunals on matters concerning the revenue; but, whatever may have been its origin, this is admitted to be an application to the discretion of the Court; and no case having been made for the exercise of this extraordinary power, the Court will not interfere.

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Walton, having been directed by the Court to apply his observations to the question, whether the defendant was acting as an officer of the Excise, or merely as an officer of the Sheriffs, in reply, referred to the statute 7 & 8 *Geo. 4*, c. 53, s. 96, and to the warrant annexed to the affidavit, by which it appeared that he had been appointed bailiff by the solicitor of the Excise.

GARROW, B. (a).—This is an application to remove into this Court an action brought in the Court of *Common Pleas*, in which the plaintiff complains of a breach of the law, which directs that no prisoner shall be carried to gaol on an arrest, before the expiration of twenty-four hours after the arrest. Happily, in these times, there is no disposition in this or in any other Court, to extend its jurisdiction; and, happily too, there is now no jealousy on this subject, either between the Courts, or in the mind of the public. I do not apprehend it to be necessary to this application, that the King should have a peculiar and direct interest in the verdict, but it is sufficient to warrant the interposition of this Court, if the subject matter of the action be of such a nature as to make it desirable that it should be decided in a Court which is peculiarly conversant with questions arising upon the construction of the revenue law. In the present case the warrant is granted to the defendant, on the application of the solicitor of Excise. The defendant executed that warrant, and, as is alleged, executed it improperly. That question will be dealt with in

(a) The Lord Chief Baron was sitting in Equity.

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this Court in the same manner as in any other Court. It is enough, if the subject concern the revenue and the administration of the law affecting it. In the case of the Collector of *Bristol*, referred to in *Cawthorn v. Campbell*, this Court ordered the cause to be tried here; though, as Lord Chief Baron *Eyre* says, the King's interest was not directly touched, but it was incidental to the cause, whether the duties were or were not to be paid. In the present case, if the question were merely whether this was or was not a proper arrest, it might be difficult to say, how the King was directly interested; but, as the arrest was under *Exchequer* process, a question is likely to arise, whether the plaintiff was or was not liable to be treated in the manner complained of, and such question appears to me fit to be tried in this Court, where questions of revenue are constantly decided.

VAUGHAN, B.—I also am of opinion that this cause ought to be removed. It does not appear to me to be necessary to advert to the different grounds upon which this privilege is founded, because I am of opinion that the defendant is within the fourth class of persons privileged, according to the judgment of Lord Chief Baron *Eyre* in the case of *Cawthorn v. Campbell*, which has been so often alluded to in this discussion. That class is, "where one is an officer of the Court, or attends as an officer of the Court;" which class has very properly been confined by Lord Chief Baron *Eyre*, to officers acting in the execution of their duty. In my view of the case, therefore, it is only necessary to consider whether this defendant was acting in the execution of his duty as an officer of the Excise, when the act complained of was committed, in order to see whether he is entitled to this privilege, and to call for the interposition of this Court. Now the facts of the case are shortly these:—The defendant, who is an officer of the Excise,

makes a seizure, upon which an information is filed against the plaintiff, and, a *subpœna* having been issued, which the plaintiff refused to obey, an attachment is sent to the Sheriff, to take the plaintiff into custody, for his contempt. The statute 7 & 8 Geo. 4, c. 53, s. 95, directs the Sheriff to grant his warrant to the officer selected by the solicitor of the Excise, and the officer so appointed is not the officer of the Sheriff, but the officer of the Excise, for the subsequent section indemnifies the Sheriff for the acts of such officer. Under this statute, and by the direction of the solicitor of Excise, the Sheriff granted to the defendant his warrant; under which the arrest took place, and in consequence of which the act complained of was committed. I cannot, therefore, but consider, that the act was done by the defendant in the execution of his office, as an officer of the Excise. The defendant therefore is entitled to this privilege, upon the ground stated by Lord Chief Baron *Eyre*, tied up, as it is, to something done in the execution of his office.

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BOLLAND, B.—I agree with the rest of the Court, on the ground stated by my brother *Vaughan*. I should have entertained great doubt, if the officer had not been connected with the proceedings by the authority of the solicitor to the Excise, whether the Crown would have been so far interested as to make this a fit case to call upon the Court to remove the cause. But as the facts appear on the affidavits, I entertain no doubt.

Order granted.

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CROWLEY v. DEAN.

In a country cause, where issue is joined in *Michaelmas* Term, and the plaintiff does not proceed to trial at the Assizes after *Hilary* Term, the defendant may, in *Easter* Term, move for judgment as in case of a nonsuit.

IN *Michaelmas* Term last, issue was joined in this, which was a country cause. No notice of trial was given. In this Term, a rule for judgment as in case of a nonsuit was obtained by *Cresswell*, against which

Sir William Owen shewed cause, and contended that the application was premature. He cited *Tidd's Practice* (a), where it is said, that "in a country cause, where notice of trial is given for the Assizes, the defendant may move for judgment as in case of a nonsuit; but the plaintiff is not bound to give notice of trial, till the Term succeeding that in which issue is joined; and if he do not, the defendant cannot move for judgment as in case of a nonsuit, till after the next Assizes;" and insisted that the word "next," must be understood to mean the second Assizes after the issue was joined; for, otherwise, that word would be superfluous, as the defendant could not move before the next Term following the first Assizes. He relied also upon the case of *Spiers v. Parker* (b), in which, under the like circumstances, a similar rule had been abandoned; and urged, that the rule of Court, *Easter* Term, 1824 (c), left the question untouched.

Cresswell, contra.—The plaintiff is not bound to pro-

(a) 2 Tidd, 764.

(b) In that case, issue was joined in a country cause in *Trinity* Term, but no notice of trial was given. In *Hilary* Term, *Kelly* obtained a rule for judgment as in case of a nonsuit.

Sir William Owen, who shewed cause against this rule, objected that the motion was premature, no

notice of trial having been given, and the plaintiff not being bound to try until the Assizes next after the second Term after the issue had been joined.

Upon this objection, *Kelly* abandoned his motion, and the rule was discharged.

(c) M'Clel. 708.

ceed to trial at the Assizes next after the Term in which the issue is joined; upon which ground this case is distinguishable from that of *Spiers v. Parker*. The decision in that case was strictly conformable to the practice of the Court; but here, two Terms elapsed before the Assizes, and the plaintiff is guilty of a default in not taking down the cause for trial. In substance, the rule of Court directs that no rule for judgment as in case of a nonsuit shall be granted in the next Term after issue joined, unless notice of trial be given, which implies an affirmative that such a rule may be moved in the third Term, where the Assizes do not occur next after the Term in which issue is joined.

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Per Cur.—Where there are no cases which bear expressly upon the point before the Court, we must look to the terms of the statute upon which this application is founded. The statute directs, that where any issue is joined, and the plaintiff shall not bring such issue to trial according to the course and practice of the Court, it shall be lawful, upon motion, to give the like judgment as in case of a nonsuit (a). By the practice of the Court, the plaintiff must proceed to trial at the Assizes next after the Term succeeding that in which the issue is joined; and therefore the plaintiff has here been guilty of a default. In the case referred to the issue was joined in an issuable Term, and therefore that rule was very properly abandoned, because in that event the plaintiff was not bound to proceed to trial at the next Assizes.

The rule was ultimately discharged upon a peremptory undertaking.

(a) 14 Geo. 2, c. 17, s. 1.

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BROWN v. WINDSOR.

In 1803, the plaintiff's house was built against the pine end wall of the defendant's house, by permission. In 1829, the defendant made an excavation in a careless and unskilful manner, in his own land, near to his pine end wall, by which he weakened his pine end wall, and, consequently, injured the house of the plaintiff:—*Held*, that an action on the case was maintainable for this injury.

Declaration alleged, that the plaintiff was possessed of a messuage &c., belonging to and supporting which there were certain foundations, which the plaintiff had enjoyed, &c., and ought, &c., to enjoy. On evidence, it appeared, that the plaintiff was only entitled to an easement in the foundations which belonged to the defendant:—*Held*, no variance.

CASE. The *first* count of the declaration stated, that whereas the plaintiff before and at the time when, &c. was, and from thence hitherto had been, and then was, lawfully possessed of a certain messuage or dwelling-house, situate &c., *belonging to, and supporting which said messuage or dwelling-house*, before, and at the time when &c., there were certain foundations, which the plaintiff had enjoyed, and was then enjoying, and then ought to enjoy, for the support of the messuage or dwelling-house, without the hindrance or disturbance of the defendant, or any other person; yet the defendant, well knowing &c., but contriving and intending &c., to deprive the plaintiff of the use, benefit, and enjoyment of the said foundations, and to disturb him in the use and occupation of the said dwelling-house, on &c., at &c., wrongfully and injuriously dug and made, and caused and procured to be dug and made, a certain excavation in the earth, near to the said foundation of the said messuage or dwelling-house, by means and by reason whereof the ground and soil under the said foundations, and upon which the said foundations rested, then and there became and were loosened, weakened, and disturbed; and part of the said ground and soil, by reason of the said excavation, forced itself from beneath the said foundations, and fell into the said excavation; and whereby, also, the said foundations were then and there weakened and disturbed, and then and there failed and gave way, and also a certain wall forming part of the said dwelling-house of the said plaintiff then and there also was lowered and sunk. The count then proceeded to state consequential damage to the plaintiff's dwelling-house.

The *second* count stated the possession of the dwelling-house, the right to and enjoyment of the foundations, and the wrongful and injurious act of digging the excavation,

in the same terms as in the first count, but stated the cause of the sinking of the wall more simply and the special damage less in detail.

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The *third* count was similar to the others, except, in stating that the excavation, from which the injury arose, was carelessly and unskilfully made and dug, instead of wrongfully and injuriously, as in the two former counts. Plea—Not guilty.

At the trial, before *Goulburn, J.*, at the last Great Sessions for the county of *Cardigan*, it appeared, that the plaintiff's house was built in the year 1803, against and supported by the pine end wall of the defendant's house, which was a much older building. Permission to build in this manner had been asked from *Dr. Bowen*, the then owner of the defendant's house, who at first refused, but subsequently gave the plaintiff permission to build upon his pine end wall. The defendant made an excavation in his own land, near the pine end wall, for the purpose of making a cellar, which caused a sinking of the pine end wall, and thereby injured the plaintiff's house, which rested against the pine end wall. The excavation, soon after its commencement, might have been seen by any person passing along the street where these premises were situate. Upon these facts, the defendant's counsel contended, that the plaintiff ought to be nonsuited; because there was a variance between the declaration and the evidence, it being alleged, as he insisted, in every count, not only that the dwelling-house was the property of the plaintiff, but substantially that the foundations of the dwelling-house also belonged to him; whereas the evidence proved that the foundations belonged to the defendant and not to the plaintiff. The learned Judge over-ruled the objection, observing that the allegation seemed to him framed with remarkable propriety to suit the facts of the case. The defendant's counsel then insisted that the action would not lie, upon the principle laid down in *Peyton*

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v. The Mayor of *London* (a); but the learned Judge overruled this objection also, thinking that case quite distinguishable from the present. Upon the latter ground, he gave the defendant leave to move to enter a nonsuit. The learned Judge left it to the Jury to say, whether the excavation was the cause of the injury to the defendant's pine end wall, and consequentially to the wall of the plaintiff's house; and, if they were of opinion in the affirmative, he desired them to inform him if the work was carried on with that skill and care which every man is bound to exercise when doing an act which may injure his neighbour. The Jury found, that the excavation was the cause of the injury, and that the work was carried on in a careless and unskilful manner, and gave a verdict for the plaintiff with 50*l.* damages.

Sir *William Owen* having obtained a rule *nisi* to enter a nonsuit, or for a new trial, on the objections made at the trial—

Russell, Serjt., and *E. V. Williams*, now shewed cause.—There is no variance between the declaration and the evidence. The counts state that the plaintiff was possessed of a house, belonging to and supporting which there were certain foundations, which the plaintiff had enjoyed, and had a right to enjoy. Every house must have foundations belonging to and supporting it; and the allegation is, not that the foundations belonged to the plaintiff, but that the plaintiff had a right of easement in them. As to the other point, it is a most alarming proposition, that a man may excavate in so careless a way as to injure his neighbour, and yet that no action will lie. The facts found by the Jury compel the other side to go to this extent, and, for that purpose, they rely on *Peyton v. The Mayor*

(a) 9 B. & C. 725.

of *London*. That case affords no authority for such a position. There, if the plaintiff had shored up his house sufficiently, no damage would have occurred; and Lord *Tenterden* was of opinion that the injury was not occasioned by any misconduct on the part of the defendant. Moreover, in that case there was neither allegation nor proof of any right in the plaintiff to have his house supported by that of the defendant; whereas, in the present case, the easement is expressly averred, and the evidence of twenty-seven years' enjoyment is sufficient to establish that easement either by grant or licence. By the principles of the common law, and by authorities which have never been questioned, the right of action under such circumstances, is clearly established. The well-known maxim of law is, *sic utere tuo ut alienum non ledas*; upon the application of which to a case like the present there are many authorities. Thus, in *Comyns's Digest*, Action on the Case for Nuisance (A), it is said, "that if a man dig a pit in his land, so near that my land falls into the pit, an action on the case lies." So, in *Slingsby v. Barnard* (a), where the defendant dug a cellar so near the plaintiff's house, that he undermined it, by reason whereof part of the plaintiff's house fell; and again, in *Roberts v. Read* (b), where surveyors of highways dug so near the plaintiff's wall, that they injured it;—the same principle was recognised and adopted. Every objection which can be made in the present case arose, and was on the record in the case of *Smith v. Martin* (c); and yet *Saunders*, who was counsel for the plaintiff in error in that case, never thought of taking an objection on the ground now taken. These cases and principles are quite familiar, and are conclusive in favour of the plaintiff in the present action.

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Sir *William Owen*, and *John Evans*, in support of the

(a) 1 Roll. 430.

(b) 16 East, 215.

(c) 2 Saund. 394.

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rule.—The averment, that the foundations *belong* to the dwelling-house, which is laid to be the plaintiff's, amounts to a substantial averment that such foundations are part of the dwelling-house and belong to the plaintiff. These foundations were proved to belong to the defendant; upon which ground, the plaintiff ought to have been nonsuited. But independently of this point the defendant is not liable. Admitting that the excavation was carried on in an unskilful and careless manner, still the plaintiff cannot recover; for, according to the decision of the Court of *King's Bench*, in *Peyton v. The Mayor of London*, it was the duty of the plaintiff to protect himself by shoring up his house, and, having omitted to do so, he is in fault, and cannot recover, even though the defendant may not himself be free from blame. The work was notorious and must have been known to the plaintiff, who therefore cannot allege that he was ignorant of what might probably be the consequence of the plaintiff's act, and cannot recover upon that ground, even though the declaration had proceeded upon a want of notice. It is not in every case where a man sustains damage that an action may be maintained against the party causing it. An action does not lie for an act not prohibited by law, though it be to the damage of the party (a). *Rex v. The Commissioners of Sewers for Paghams* (b). Thus, it is laid down (c), that "an action does not lie for an act not prohibited by law, though it be to the damage of the party; as, if a lessee at will by negligence burn his house, an action upon the case does not lie, for the law does not punish him for permissive waste." The present cannot be said to be a wrongful act, when it has been decided, in *Peyton v. The Mayor of London*, that a neighbour may pull down his wall altogether without being liable to an action. *Smith v. Martin*, *Slingsby v. Barnard*, and the

(a) Com. Dig. *Action on the case*, (B 3).

(b) 8 B. & C. 355; S. C. 2 M. & R. 468. (c) Com. Dig. *ubi supra*.

other cases referred to, are clearly distinguishable from the present; because, in those cases, the injury directly affected the land of the neighbour. In *Smith v. Martin*, the land of the plaintiff fell into the pit dug by the defendant, and the same in *Slingsby v. Barnard*. In the present case, had there been no easement, no injury would have been sustained. The act did not extend to the plaintiff's land, and therefore the plaintiff's right of action must depend entirely upon the nature of the easement. Now, unless it can be contended, that, where a licence to build against the wall of another is once granted, the grantor is for ever incapacitated from using that wall, so as to affect the enjoyment of the easement, and that the grantee is not bound to protect himself from any consequences which may ensue from alterations made by the grantor, even where they are notorious, the present action cannot be maintained. Here, it was not even left to the Jury to say, whether the plaintiff might not have protected his wall by propping. *Pomfret v. Ricroft* (a), *Taylor v. Whitehead* (b), and *Bullard v. Harrison* (c), shew that, if, by want of repair, the defendant had allowed his wall to be weakened, and the injury to the plaintiff's wall had happened in consequence, the defendant would not have been liable. The argument on the other side would go the length of shewing, that, where such a licence as the present has once been given, the owner can never remove his property, but is for ever debarred from doing any act on his own property which may at all affect the enjoyment of the easement. Such a doctrine would throw on the owner, were he ever to make any alteration, the responsibility of taking care of his neighbour's premises, which it is much more convenient should lie on the owner of those premises, according to the decision of the Court of *King's Bench* in the case of *Peyton v. The Mayor of London*.

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(a) 1 Saund. 321.

(b) 2 Doug. 745.

(c) 4 M. & S. 387.

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GARROW, B.—This was an action on the case, tried at the Great Sessions for the county of *Cardigan*, in which the plaintiff recovered a verdict, and the motion now before the Court is to set aside that verdict and enter a nonsuit, or for a new trial. It has been argued that the plaintiff should have been nonsuited, on a supposed variance; but that argument is founded on a mistake as to the terms of the declaration. If the allegation were, that the plaintiff was possessed of the house and foundations, there might be something in the objection; but the allegation is merely that he was possessed of a house to which certain foundations belonged. Upon the other question it appears, that *Dr. Bowen* was the owner of the defendant's house in 1803. He might have said to the plaintiff, when he began to build his house, "you shall not touch my wall, you must build foundations for your own house;" and he seems to have done this in the first instance. The plaintiff then paused for a time, and did not proceed till he subsequently obtained permission from *Dr. Bowen*, to build against his pine end wall. When such an easement is given, the owner of the premises can only use his rights subject to such easement. Thus, if the owner of *Whiteacre* grant a right of way over *Whiteacre* to *Blackacre*, he cannot afterwards use his right of soil on *Whiteacre*, so as, by building or otherwise, to interfere with the enjoyment of the easement he has granted. In the present case, there has been an acquiescence since the year 1803, and I am therefore of opinion that the allegation as to the easement was made out by the evidence. I am not distressed by the judgment in the case of *Peyton v. The Mayor of London*. It was held there, that, on that declaration, the plaintiff could not recover, because the want of notice was not alleged, and because the plaintiff neither alleged nor proved any right to have his wall supported by that of the defendant. It is said, that, by the principles of the common law, and adjudged cases, a party may deal as he

pleases with his own property; but I must add to that proposition, that he must so deal with it that he work no injury to his neighbour. If, after acquiescing twenty-seven years in such an easement as the present, the defendant makes a trench so as to injure his own pine end wall, and consequentially his neighbour's property, I am of opinion that he is liable for such injury. There may be cases, where a man, altering his own premises, cannot support his neighbour's, and the support if necessary must be supplied elsewhere. In such case, he must give notice, and then, if any injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take due precaution.

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VAUGHAN, B.—I am of the same opinion. There is no foundation for either of the objections which have been taken. As to the variance, when the evidence is adverted to, it is exactly in conformity with the declaration, which avers, that the plaintiff was possessed of a messuage, belonging to which were certain foundations which he had been used to enjoy, and had a right to enjoy, and that the defendant, intending to deprive him of the enjoyment of the foundations, did the acts complained of. The argument is, that this was a substantial averment that the foundations belonged to the plaintiff, whereas, it was proved, that they belonged to the defendant. This is not an averment of property in the foundations, but of an easement; and the expression will bear no other construction.

As to the other objection, if a party grant an easement like the present, and then act so that it cannot be enjoyed, an action lies. The law laid down at the trial by the learned Judge appears to have been perfectly correct. It is argued to be incorrect, on the ground that it is opposed to the decision in the case of *Peyton v. The Mayor of London*, but there is no resemblance between that case and the present. In that case, the defendant was charged

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with taking down his own house without using proper precautions to protect that of the plaintiff. The question there was, whether the mere circumstance of having a house next to that of the defendant, gave to the plaintiff a right to complain, if the defendant pulled down his house, without protecting that of the plaintiff by shoring. No easement was either alleged or proved there. And Lord *Tenterden's* judgment shews what he would have thought if such had been the case, as he expressly decides on that point; for he says:—"The declaration in this case does not allege as a fact, that the plaintiffs were entitled to have their house supported by the defendant's house, nor does it, in our opinion, contain any allegation from which a title to such support can be inferred as a matter of law (a)." In the present case, however, the declaration is so framed, and contains allegations of such right. The proof of such easement in this case is not merely presumptive from the enjoyment, but there is actual proof of a permission, and that after a prior refusal. The case of *Peyton v. The Mayor of London* is, therefore, clearly distinguishable from this. *Slingsby v. Barnard* is, however, directly in point. This is said not to be a wrongful act, but I am of opinion that it is a wrongful act to injure the property of a neighbour in the manner proved. The Jury have found that the excavation was the cause of the injury, and they have found that the work was done so carelessly as to occasion the damage. This action therefore appears to me to be maintainable. The declaration shews an easement and a wrong to that easement. The plaintiff has proved all that he has alleged, and he is entitled to recover *secundum allegata et probata*.

BOLLAND, B.—I agree with the rest of the Court on both points; and as my learned brothers have gone so fully

(a) 9 B. & C. 735.

into the reasons of our judgment, it would be a useless consumption of time for me to go exactly over the same ground. I will therefore confine my observations to a point raised by the counsel for the defendant. It was urged by them, that the work done by the defendant was notorious and well known to the plaintiff, and therefore that he, by not interfering, must be taken to have acquiesced. That argument however does not apply to the present case; for the defendant might have said, I cannot object to what is doing, because I must suppose that it will be done with skill and care. Although, therefore, it might be notorious that the work was going on, and although the plaintiff might know that fact, still he could not calculate on the want of skill which the Jury have found here. If the work had been of such a nature as necessarily to have occasioned an injury, there might have been something in this argument, for then the plaintiff might apply to *Chancery*, or otherwise interfere, to stop the work, or in some instances might perhaps protect himself by shoring. It is however unnecessary to express an opinion upon a point which does not arise in this case; and I concur with the rest of the Court that this rule must be discharged.

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Rule discharged.

SYMONDS v. PAGE.

TO an action of ejectment on the demise of the plaintiff, the defendant appeared and pleaded, but at the Assizes withdrew his plea, under a Judge's order, undertaking to deliver immediate possession to the plaintiff. The plaintiff entered up judgment, but no costs were taxed by the Master, and the plaintiff did not apply to the Court to have his costs taxed, but brought an action of trespass for the mesne profits, in which the defendant suffered judgment by default. On the execution of a writ of enquiry upon this last

The costs of an ejectment may be recovered in an action for mesne profits, though the defendant has appeared and pleaded in the ejectment, and no costs have been taxed.

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mentioned judgment, the Jury included in their verdict the sum of 50*l.* for the costs of the ejectment.

Follett had obtained a rule to set aside this inquisition, on the ground that these costs ought not to have been included, against which—

Taunton now shewed cause.—Costs are incidental to a judgment, and the general rule is, that, in an action for mesne profits, the costs of recovering the possession may be included as part of the damages. There is no legal or formal impediment in this case to prevent the application of this general rule. In *Brooke v. Bridges* (a), the defendant had paid the taxed costs upon the judgment in ejectment, and the plaintiff before the Sheriff's Jury claimed the extra costs, which the Under-sheriff directed the Jury to give; but the Court of *Common Pleas* dissallowed the extra costs, proceeding upon the distinction in *Doe v. Davis* (b). In that case, Lord *Kenyon* said, that where there was a judgment by default in such case, the plaintiff might in this action go into evidence and recover the costs of such judgment, as well as the mesne profits of the estate; but where the ejectment had been defended, and the plaintiff had recovered and taxed his costs, he could not recover above his taxed costs. In *Brooke v. Bridges*, it was a mere experiment by the plaintiff to get extra costs; and the expression of Lord *Kenyon* in *Doe v. Davis* does not mean, that the plaintiff cannot recover costs in the action for mesne profits, where the ejectment has been defended, but merely, that where the costs have been taxed, he cannot recover above the taxed costs. But the case of *Nowell v. Roake* (c), though distinguishable in circumstances, is expressly applicable on principle. On the judgment of reversal in error, the plaintiff was not entitled to costs; and, therefore, there could have been no taxation. In an ac-

(a) 7 Moore, 471.

(b) 1 Esp. 358.

(c) 7 B. & C. 404.

tion for mesne profits, the Jury, under the direction of the learned Judge who tried the cause, gave the costs in error as between attorney and client. Upon a motion for a new trial, Lord *Tenterden* said, "there could be no doubt that a Court of error could not award costs to the plaintiff. But the expenses incurred in the Court of error were part of the damages sustained by the plaintiff by reason of his having been wrongfully kept out of possession by the act of the defendant; and I think that the Jury might reasonably consider the costs between attorney and client as the measure of the damages he had sustained."

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Follett, contra.—The general rule is, that if there be judgment against the casual ejector, the costs may be recovered in an action for mesne profits, but if the ejectment be defended, the costs are costs in the cause, and cannot be recovered in the action for mesne profits (a). In *Doe v. Davis*, it was decided, that, in trespass for the mesne profits, if the ejectment was regularly defended, the plaintiff could go for no costs of it, for they must be supposed to be paid in the costs of that action; although it is otherwise if there had been judgment by default against the casual ejector. Lord *Kenyon's* expression, that the plaintiff could not recover above his taxed costs, does not mean that he could recover those, which is shewn by the result, as the plaintiff only recovered one shilling (b). In *Brooke v. Bridges*, the same distinction was taken. In the present case the costs never were taxed by the officer of the Court, and the Jury are not the proper persons to tax them. In *Nowell v. Roake*, the costs could only be recovered in an action for mesne profits. All the cases establish the dis-

(a) B. N. P. 88.

(b) It seems probable that the taxed costs had been paid in this case, as *Erskine*, in his opening for the plaintiff, stated that he went

for the *extra* costs of the ejectment as well as for the value of the premises, making no claim for the taxed costs.

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tion contended for, and there are no decisions or *dicta* to shew that costs can be recovered in an action for mesne profits where the party has appeared to and defended the ejectment.

ALEXANDER, L. C. B.—It appears to me, that this rule must be discharged. The result of the cases is, that the plaintiff may recover in this form of action the costs of the action of ejectment; and I think the judgment of Lord *Kenyon* in the case of *Doe v. Davis* is not fairly stated, when it is said, that the language of that learned Judge shews that the costs cannot be recovered unless they are taxed. What he says is, that if the costs are taxed, they may be recovered in this form of action. That is the fair inference to be drawn from the language of that learned Judge; and his objection is to the recovery of the extra costs. It certainly would be more convenient, that in every case the costs should be taxed; because the officer of the Court is a much better Judge of what should be allowed than a Jury. But the result of the cases is, that the costs of the ejectment may be recovered though they be not taxed.

GARROW, B.—I am of the same opinion. It is self evident, that, where the merits of the cause are ascertained, the costs should be taxed, and obtained in the most expeditious manner; but if they are not so obtained, and there is another mode in which justice may be done, I do not see why the plaintiff should not have recourse to that. All that is established in the cases is, that Courts of justice will not encourage a course which leads to multiplicity of actions, where the costs may be recovered in a summary way, but where an action is brought for the mesne profits, there is no reason why an item for the costs of the ejectment should not be included. I find it impossible to distinguish this case in principle from the case of *Nowell v. Roake*, which

has been cited, and, therefore, think that this rule should be discharged.

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VAUGHAN, B.—I am of the same opinion. This is an application to set aside an inquisition which was executed before the Sheriff, on the ground that the costs of the ejectment ought not to have been included. It is laid down broadly by the counsel for the defendant, that where the tenant appears to defend an action of ejectment, the only remedy for the plaintiff's costs is on the judgment in ejectment, and that such costs cannot be recovered in an action of trespass for the mesne profits. Had any decision been brought before us establishing that proposition, I should have been slow to disturb it, but, I ask, where is the authority for such a position. Two cases have been cited, to support the argument for the defendant. The language of Lord *Kenyon*, in *Doe v. Davis*, does not appear to me to warrant the inference which the defendant's counsel would draw from it; for it must be remembered that in that action the plaintiff sought to recover his "extra costs." Lord *Kenyon* there lays down, that the plaintiff cannot recover *more than* his taxed costs; therefore, I should say that he thought that the taxed, but not the extra costs, might be recovered. *Brooke v. Bridges* was an attempt to recover the extra costs, and the only question was, whether such extra costs could be recovered. The Court would not have decided upon this narrow ground, if the costs of the ejectment could not be recovered at all in this form of action. These are the only authorities which have been cited for the defendant; but the case of *Gulliver v. Drinkwater* (a) appears to me to be an authority which goes the whole length of the proposition contended for by the plaintiff. In that case, there was a recovery in ejectment, and before the action for mesne profits had been brought,

(a) 2 T. R. 261.

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the defendant became a bankrupt. Upon a writ of inquiry, in the action for mesne profits, the Jury did not include in their verdict the costs of the ejectment. On a motion to set aside the inquisition, the natural answer would, if the defendant's argument be correct, have been, that the costs would not be allowed by law; but the Court treated it as an application to their discretion, and refused the motion, because the costs were proveable under the commission against the defendant, and it was an attempt to obtain, in an oblique way, more than could have been recovered in a direct manner. In that case, *Ashhurst, J.*, said, that in many instances, in actions of trespass for mesne profits, the Jury took into their consideration the costs incurred in recovering possession by ejectment. Now, it is clear, that, in that case, the ejectment had been defended. *Nowell v. Roake* may perhaps be distinguishable from this, because, in that case, the costs in error could not have been recovered in any other mode; but, that case is important to shew the latitude of the principle under which, in an action for mesne profits, the plaintiff is allowed to recover all damages fairly resulting from his having been wrongfully kept out of possession. I therefore am of opinion, that, in discharging this rule, we contravene no authority, but act in conformity with the decided cases.

BOLLAND, B.—In the case of *Gulliver v. Drinkwater*, it is clear that the Court thought that the plaintiff in such a case might legally recover the costs of the ejectment in this form of proceeding; but they decided the case upon the principle, that, the defendant having become a bankrupt, they would not allow the plaintiff to recover in that mode of proceeding the whole of the costs, when, by proving under the commission, a part only could have been obtained. Their judgment shews that they thought the whole recoverable in point of law, but they treated the motion as an application to their discretion.

Rule discharged.

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IZOD v. LAMB, Bart.

CASE against the Sheriff of *Sussex* for a false return of *nulla bona*. Upon the trial, before *Alexander, L. C. B.*, at the *Middlesex* Sittings after *Trinity* Term, the following appeared to be the facts of the case: By indenture, dated the 22nd *May*, 1815, between *M'Nellage*, of the first part; *Anne Innes*, of the second part; and two trustees, of the third part; reciting, that a marriage was to be solemnized between *M'Nellage* and *Anne Innes*, and that she was possessed of, amongst other things, "household furniture, bed and table linen, plate, pictures, and prints, of the value of the sum of 1000*l.*, or thereabouts;" and that it had been agreed that in case she survived him, she should have "the said household furniture, bed and table linen, plate, pictures, and prints, or whatever of such respective articles should, during her coverture, be bought in lieu of the present ones, for her own use and benefit; and in case she should die before him, she should have the power of disposing of the said household furniture, bed and table linen, plate, pictures, and prints;" it was witnessed that *M'Nellage* did covenant with the trustees, their executors, &c., that he should not, nor would, without the consent, in writing, of *Anne Innes*, sell, dispose of, or destroy, any part of the household furniture, bed and table linen, plate, pictures, and prints, which then did or should, on the day of the solemnization of the marriage, belong to her or to him in her right; and that, upon any part of such household furniture, bed and table linen, plate, pictures, and prints being disposed of or worn out during his life, he would purchase new or other articles of the like nature, and of the same value; and in case she should survive him, that she

N., in a marriage settlement, reciting that *I.*, his intended wife, was possessed of certain goods, and that it had been agreed, that in case she survived him she should have the goods and such articles as might be bought in lieu thereof, for her own use, and in case she should die before him, that she might dispose of the goods, covenanted with trustees that he would not dispose of the goods without the consent of *I.*, that he would purchase new articles in lieu of those which might be worn out or disposed of, that if she survived him she should have the goods for her own use, and if he survived her she should dispose of them, subject to his life-interest. No assignment of the goods was made to the trustees. *N.* and *I.* separated after their marriage, and *I.* demised the goods to *F.*, as a year-

ly tenant:—*Held, first*, that the goods were, notwithstanding the settlement, the property of *N.*, and might be seized under a *fi. fa.* against him; but, *secondly*, that they could not be seized for his debt during the continuance of the demise to *F.*

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should have all the household furniture, bed and table linen, plate, pictures, and prints which then did, or, on the solemnization of the marriage, should belong to her or to him in her right, and other the articles, in like manner, which, during the continuance of the marriage, should be purchased in lieu thereof; and further, in case she should survive him, that he would, by his last will or otherwise, convey and assure to her all the real and personal estate of which she might be possessed at the time of his decease, to her for her own use and benefit; and also, in case he should survive her, that it should be lawful for her to give, devise, and bequeath the household furniture, bed and table linen, plate, pictures, and prints, and the articles which, during his life, might be bought in lieu thereof, subject to his life-interest therein. No assignment of the household furniture, bed and table linen, plate, pictures, and prints, was made to the trustees so as to vest the legal interest in them. The marriage was solemnized, and the parties lived together for some years after the execution of this deed. In 1819, *M'Nellage* executed a deed-poll, by which, after reciting that he had bought a piece of land, upon which he had built two houses, &c., he declared that he had done it with the money of his wife; and that the household furniture, bed and table linen, plate, &c. therein, were the separate property of his wife: and he agreed that he should stand seised of the land, houses, household furniture, &c. in trust for his wife, and that she might dispose of the same according to the provisions of the marriage settlement, reserving to himself all the rights and interest which he had under that settlement. *M'Nellage* and his wife lived together until the year 1823, at which time they separated, she having possession of one of the houses mentioned in the deed poll, with the furniture, &c. therein. This house, with the furniture, &c., she let by agreement to one *Mrs. Finch*, at a certain rent, reserving to herself the right, when she chose to exercise

it, of occupying one apartment in the house, and of using part of the furniture, paying for her board and lodging at the rate of 70*l.* *per annum*. On the 16th of *May*, 1829, whilst *Mrs. Finch* was in possession of the house and furniture under this agreement, the officers of the defendant, as Sheriff of *Sussex*, entered into the house, and took possession of the goods, under an execution at the suit of the plaintiff against *M^cNellage*, and, after remaining in possession for about a week, withdrew. The defendant returned *nulla bona*.

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Upon these facts it was contended, *First*, That the deeds of 1815 and 1819 made *M^cNellage* a trustee for his wife, so that the defendant could not seize the goods under an execution against him. *Secondly*, That if the Sheriff could seize under the circumstances, he could only sell such interest as *M^cNellage* had; and *Thirdly*, That the possession of the lessee protected the property from the execution.

These points the Lord Chief Baron reserved, and under his direction the Jury found a verdict for the plaintiff for 222*l.*

In *Michaelmas* Term, *Jones*, Serjt., obtained a rule to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered; against which—

Jervis and *Starkie* shewed cause. The *first* ground upon which this rule was obtained, is, that the husband is a mere trustee for his wife, and that, therefore, the goods are not liable to be seized under an execution against him. As a general rule, all the personal estate, as money, goods, cattle, household furniture, &c., which were the property and in the possession of the wife at the time of the marriage, are actually vested in the husband *jure mariti*; so that of these he may make any disposition in his life-time without her consent, or may by will devise them; and they shall, if there be no such dis-

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position, go to the executors or administrators of the husband, and not to the wife, though she survive him (a). To this general rule, however, there are some exceptions, and, amongst others, the goods of the wife may be protected by the intervention of a trustee. *Haslington v. Gill* (b), *Dean v. Brown* (c), *Scott v. Scholey* (d), *Farr v. Newman* (e), *Howard v. Jemmet* (f), *Bransby v. Grant-ham* (g), *Lord Shaftesbury v. Russell* (h). But in these cases a trustee was actually interposed, whereas, in the present, it was obviously the intention of the parties to rely upon the personal covenant of the husband. It is true, that Courts of equity will interfere to effectuate the intention of the parties. Thus, in *Bennett v. Edwards* (i), where I. S. devised lands to his daughter, the wife of a tradesman, for her separate use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have the lands for his life in case he survived his wife, but that they should go to her heirs, it was holden in equity that the husband was but a trustee. But decisions in equity are not binding upon Courts of law, because a Court of equity will interfere to effectuate the intention of the parties, which a Court of law cannot do.

Secondly, it is contended that *M'Nellage* had merely a life-interest in the property. This is involved in the first proposition, for if no trustee be interposed, the husband takes the property of the wife absolutely *jure mariti*, although she may have a remedy over upon his covenant.

Lastly, it is said, that the property is protected by the

(a) Bac. Abr. *Baron & Feme*,
(C 3); 1 Inst. 3 a.

(b) 3 T. R. 620.

(c) 5 B. & C. 336; S. C. 8 D. &
R. 95.

(d) 8 East, 467.

(e) 4 T. R. 621.

(f) 3 Bur. 1368.

(g) Plowd. 525.

(h) 1 B. & C. 666; S. C. 3 D.
& R. 84.

(i) 2 P. Wms. 316.

lease to *Mrs. Finch*. Had the whole property been leased, the reversion might be sold subject to the right of the lessee. Thus, it is said (a), that, subject to the right of the pawnee or lessee, the goods may be taken in execution, and the Sheriff is not liable to an action for selling the entire property, unless he be apprised that the defendant has only a special interest therein. So, in *Scott v. Scholey*, it was admitted throughout the argument, that goods leased might be sold by the Sheriff, subject to the interest of the lessee. But these goods are not all protected by the lease, for part are reserved to the wife, and to that extent the Sheriff was, at all events, bound to seize and sell.

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Jones, Serjt., and R. V. Richards, contra.—To ascertain what property may be taken in execution, the law looks to the personal beneficial interest of the debtor, and if he have no personal beneficial interest, the goods cannot be taken; for the law distinguishes between technical and beneficial property. Now, although by the marriage settlement no trustee is interposed, and the legal interest in the property is in the husband, in a Court of equity the husband would be a trustee for his wife. This was expressly decided in the case of *Bennett v. Edwards* (b); and the case *Haslington v. Gill* (c) establishes that where ever the trust can be supported in equity, a Court of law will consider the trustee entitled at law. Had *M'Nellage* become bankrupt, this property would not have passed to his assignees, for, upon the construction of the bankrupt law, it is immaterial whether a trustee be or be not interposed, and no property of the husband, in which he has not a beneficial interest, will pass by the assignment (d). It may be said, however, that a judgment creditor stands in

(a) 2 Tidd, 1028.

(b) 2 P. Wms. 316.

(c) 3 T. R. 620.

(d) See the cases collected Eden,
B. L. 245.

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a more favourable position than the assignees of a bankrupt: but there is no real ground for that distinction; for, in the former case, the property goes to the satisfaction of one debt only, whereas, in the latter, it is equally divided amongst all the creditors. So goods in the hands of an executor, administrator, or trustee, are not liable to seizure upon a judgment against such parties in their own right, because the law looks to the beneficial interest in the property. *Howard v. Jemmett (a)*, *Farr v. Newman (b)*, *Scott v. Surman (c)*. But if the property can be seized *quoad* the interest which the husband has, the Sheriff can take no greater right than that of which the husband is possessed; and as he, by his contract, cannot sell without the consent of his wife, so neither can the Sheriff who claims through him. Whatever difficulty may arise upon the former branch of the argument, the goods are clearly protected by the lease to Mrs. *Finch*. All the goods are absolutely demised, and the limited use reserved to the wife is a portion of the rent merely, the property being, during the demise, in the tenant. If these goods had been taken in execution by the Sheriff upon a judgment against the tenant, the lessor could not have maintained trover, nor even trespass, against the Sheriff, because, to maintain these actions, the plaintiff must not only have the property, but the right to immediate possession. *Ward v. M'Cunly (d)*, *Gordon v. Harpur (e)*. If, therefore, the lessor has no right to the immediate possession, the Sheriff, who claims through him, can have no greater right. The case is still stronger here, for the tenancy being from year to year, the Sheriff cannot determine it, or compel the lessee to do so; and it is, therefore, impossible to ascertain the interest in the reversion, even could that interest be taken. But the point

(a) 3 Bur. 1369.

(b) 4 T. R. 621.

(c) Willes, 402.

(d) 4 T. R. 489.

(e) 7 T. R. 9.

has been expressly decided, for in *Comyns' Dig. Execution*, c. 4, it is laid down, that the Sheriff cannot take goods in pledge, or demised to another (a).

Cur. adv. vult.

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ALEXANDER, L. C. B., now delivered the judgment of the Court as follows:—

This is a rule to shew cause why a nonsuit should not be entered instead of a verdict for the plaintiff.

The plaintiff, having obtained a judgment against one *M'Nellage*, sued out a writ of *fiери facias* upon that judgment, which he delivered to the Sheriff. This writ was returned by the Sheriff, with a return of *nulla bona*. The present action was brought against the Sheriff, upon the ground that this was a false return. Upon the trial of the action before me, the plaintiff obtained a verdict for 222*l.* and I gave the defendant leave to move to set aside the verdict, and enter a nonsuit, upon certain points. It is this rule that is now to be disposed of. A short state of the facts is, that certain goods, now in question in the cause, consisting of household furniture, had been the property of the wife of *M'Nellage*, before her intermarriage with him. They intermarried in the year 1815, and, previous to that marriage, a settlement was made, relating, among other things, to this household furniture. Trustees for the intended wife were parties to that settlement, with whom the intended husband, *M'Nellage*, covenanted that his future wife should have certain interests in the goods. No assignment, however, of this furniture was made to the trustees so as to vest the legal interest in them. The rights of the wife rested, therefore, entirely upon the husband's covenant. After this deed, the two parties lived together for some years. In 1819, another deed, a deed-poll, was executed by *M'Nellage*, which does not materially affect

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this question. It appears by the recital of this deed-poll, that *M^cNellage* had bought a piece of land, and built two houses upon it, and the deed declares, that this was done with the money of *Mrs. M^cNellage*, and that the household furniture, bed and table linen, plate, &c., therein, were the separate property of his wife; and it agrees that he shall stand possessed of the house and furniture, and that his wife may dispose of them according to the provisions of the marriage settlement of 1815, and it reserves to the husband all the rights and interests which he had under that settlement. This deed leaves the rights much as it found them. From the year 1823, the parties lived separate, and *Mrs. M^cNellage* had possession of the furniture and of one of the houses mentioned in the deed-poll. In *May, 1829*, this writ of *fieri facias* was delivered to the Sheriff. Previous to that time, *Mrs. M^cNellage*, by what is called an agreement, which we think to be a demise, leased the house and furniture to one *Mrs. Finch*, at a rent mentioned in the agreement; and *Mrs. M^cNellage* stipulated for the right, when she chose to exercise it, to possess a certain apartment in the house, and for the use in that apartment of certain parts of the furniture, paying for her board and lodging after the rate of 70*l.* a-year. On the 16th *May, 1829*, the officer entered into the house to make a levy; and it appears that at that time the house and furniture were possessed under this agreement or lease, in other words, *Mrs. Finch* was in possession of the house and the principal part of the furniture, and *Mrs. M^cNellage* was in possession of an apartment and some part of the furniture, according to the stipulation. The officers remained in possession for a week, and then withdrew, and afterwards the return of *nulla bona* was made. The plaintiff had a verdict, as I have already stated, for 222*l.* The question which arose in the cause, appears from the points on which the defendant had leave to move to set aside the verdict and enter a nonsuit. They are these:—*First*, that the

deeds of 1815 and 1819 made *M'Nellage* a trustee for his wife, and therefore that the Sheriff could not seize the goods under an execution against him. *Secondly*, That if he could seize under all the circumstances, he could only sell such interest as the husband had. And *thirdly*, That Mrs. *Finch's* possession and title protected the property from the execution. Of these questions, the first led to the greatest length of discussion, much learning was employed, and much ingenuity displayed; it being, under the view of the Court, a point of very considerable consequence. That question is, whether, without the intervention of a trustee, to whom a legal interest in effects of this description shall be assigned, they can be protected from an execution against the husband. That they are so protected is contended upon this reasoning: it is said to be decided by many cases, that though the property belongs to the wife, yet that where a trustee is interposed, and the effects are assigned to him for her separate use, they are clearly protected from an execution against the husband; they then proceed to state, that when the intention of the parties is clearly signified, the husband himself may and does become a trustee for the separate use of his wife, and that, being a mere trustee, the property of his *cestui que trust* cannot be taken for his debt. This is said to be proved by many analogous cases. And they conclude that here the husband being the trustee, and the wife the *cestui que trust*, her property cannot be taken for his debt. This is the substance of the argument. It appears to us, that some part of this argument is quite solid. It is clear, that where, in consideration of a marriage, personal chattels are assigned to a trustee for the separate use of the wife, they cannot be taken in execution for the debt of the husband. A Court of law, will consider the trustee as the legal owner of the property, and, under the protection of the legal estate, the wife will have the benefit of the contract comprised in the marriage settlement. We also

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think, that the husband may, in some circumstances, be a trustee for his wife. That expression is used and has been acted upon in the Courts of equity, but it is not true in the sense in which it has been used in this argument; nor do we know that any such principle has been acknowledged or acted upon in a Court of law, and no such case has been cited in this argument. It appears to us, that, to establish such a principle, and apply it to this case, would break down the distinction of the Courts of law and the Courts of equity upon this subject. The cases in which the husband has been called a trustee for his wife are of this nature:—A testator, by his will, left a sum of money in trust for a married woman to her separate use. The trustee, in breach of his duty, without the privity and participation of the wife, paid the money to the husband. The husband was treated by Lord *Eldon* as a trustee for his wife. In acting upon this principle, and using these expressions, he cautiously avoids any wrong inference being drawn from his language: he says, that it is perfectly settled, that a husband may, in this Court, be a trustee for the separate use of his wife (*a*): and he adds, that he would be in the same situation as the person making the transfer to him. It is not for us, in this place and upon this occasion, to pronounce what decree a Court of equity would make against a husband upon a covenant, such as is contained in this marriage-settlement; but, it appears to us, that if the arguments of the defendant were accurate, all that machinery, and all those provisions so carefully introduced into settlements, in order to protect the property of a married woman for her separate use, are unnecessary. We further think, that the total absence of any express authority in a Court of law, for the broad proposition contended for on the part of the defendant, is almost conclusive against it. I have thought fit to say thus much upon

(*a*) See *Rich v. Cockle*, 9 Ves. 375.

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the general proposition, in order to prevent being misunderstood; but this particular case and the provisions of this marriage settlement are extremely unfavourable to the defendant's argument. It is not true that the covenant of the husband contained in this settlement constitutes him, in the usual sense of the word, a trustee for his wife. It appears to me, that, in the true construction of the deed, the interests of the wife are considerably limited, and that it was meant and understood that the legal interest should reside in the husband, and that he had a beneficial interest in many important respects. The recital of the agreement specifies nothing respecting this furniture, during the joint lives, but states that she was to have it if she survived; and that, if he survived, she might make a will of it; and then his covenant in respect of it is, that he will not sell or dispose of it; that, if she survived, she should be entitled to it; and then he covenants that if she survives, he will by his last will and testament, or otherwise, convey and insure all the real and personal estate which she shall be possessed of or entitled to at the time of his decease, in such manner as to enable her to possess and enjoy the same. Now this covenant includes the furniture as well as every thing else, and shews distinctly that her future possession and enjoyment were to depend upon future acts to be done by him. The whole provisions of the deed satisfy me that the view of the parties, as far as they had any, was to leave him in possession of his marital rights, and that her interests were to be enforced, when the contingencies happened, and as they happened, by means of his covenant. The deed-poll of 1819, does not materially affect this view of the case; because, beside being post-nuptial, it contains an express reservation of all his rights and interests under the settlement. We are of opinion, therefore, upon this point, that the circumstances do not warrant the return of *nulla bona*; that, at law, these goods

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are to be considered as the goods of the husband. This is an answer to the first and second points.

The next difficulty opposed to the plaintiff's verdict arises from the demise of the furniture made with the house to Mrs. *Finch*. We conceive this to be a valid demise, determinable upon three months' notice by either party. It was an existing demise at the time the Sheriff seized, and, for ought we know, at the time he made his return. We think, that, in making the demise, Mrs. *M^cNellage* was the agent of her husband. It is the consequence of this opinion that the reversionary interest alone, after the determination of this demise, could belong to *M^cNellage*. The question then is, whether the Sheriff could, during the continuance of this demise, take these goods for the debt of the husband. We think he could not, and therefore that the return of *nulla bona* is warranted by law. If these goods in the possession of the tenant had been seized by the Sheriff, under colour of an execution against the tenant, or any other person, *M^cNellage*, the reversioner, could not have maintained either trespass or trover against him. The reason is, that to maintain these actions the plaintiff must not only have a right of property but a right to the immediate possession. He has no such right during the existence of a lease. The cases of *Ward v. M^cCunley* (a), and *Gordon v. Harpur* (b), establish this proposition. If he himself could maintain no action for the possession, his creditor and the Sheriff could derive no authority from the writ against him to take that possession. The Sheriff has made, as it seems to us, a proper return. We think that the rule for a nonsuit must be made

Absolute.

(a) 4 T. R. 489.

(b) 7 T. R. 9.

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ASSUMPSIT for breach of promise to marry. At the trial, before *Goulburn, J.*, at the last *Lent Assizes* for the county of *Cardigan*, the Jury found a verdict for the plaintiff. A rule *nisi* for a new trial had been granted on the ground that the verdict was contrary to evidence.

At the trial, the plaintiff put in several letters, which were admitted to be in the defendant's handwriting; and called witnesses to prove that another letter, upon which the question mainly depended, was also in the handwriting of the defendant. The defendant called witnesses to prove that this letter was not in his handwriting.

In the course of the argument it was suggested by *John Evans*, for the defendant, that the Jury had been influenced by a comparison of handwriting, which the learned Judge had desired them to make between the admitted and disputed letters.

Per Curiam.—Where two documents are in evidence, it is competent for the Court or the Jury to compare them. The rule as to the comparison of handwriting applies to witnesses, who can only compare a writing to which they are examined, with the character of the handwriting impressed upon their own minds; but that rule does not apply to the Court or Jury, who may compare the two documents when they are properly in evidence.

The rule was subsequently discharged, the judgment of *Bolland, B.*, proceeding on an elaborate comparison which he had made between the letters in question; and he pointed out a number of remarkable coincidences between the documents, in the formation of several letters and the mode of writing several words.

The rule that comparison of handwriting is not evidence, does not extend so far as to prevent the Court or Jury from instituting a comparison between two documents, of which *prima facie* evidence has been given.

Where the plaintiff has died after verdict, the Court may grant a new trial on the application of the defendant, and would, in such case, impose terms on him to prevent his taking advantage of the plaintiff's death.

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The plaintiff died after the rule for a new trial had been obtained, and before it was discussed; and it was urged by *Wilson*, and *E. V. Williams*, for the plaintiff, that the setting aside the verdict would entirely defeat justice, as no new trial could be had, without error being assignable on the record. But the Court intimated, that they should have had no difficulty on this ground, if they had thought that the case required further consideration, as they could have imposed the terms of the verdict being entered as of the Assizes when the case was first tried, or of the defendant's undertaking not to assign error. And *Garrow, B.*, mentioned a case in which he had been of counsel, where the Court of *King's Bench* had imposed similar terms in granting a new trial on the application of the defendant, who, it was suggested, was likely to die before the cause could be tried a second time.



COWLISHAW v. CHESLYN.

In an action of trespass *quare clausum fregit*, the defendant pleaded that A. C. was seised in fee, and, being so seised, granted a right of way by non-existing grant. The plaintiff replied, traversing the grant:—*Held*, that, on these pleadings, it was not competent for the plaintiff to give evidence to shew that A. C. was not seised in fee, for the purpose of rebutting the presumption of the grant.

TRESPASS *quare clausum fregit*. Pleas, *first*, a right of way by prescription. *Secondly*, that, in 1762, one *Anne Cowlishaw* was seised in fee, and being so seised, by a deed, lost by time and accident, granted a right of way; and *thirdly*, a common highway. The plaintiff replied to the first plea, traversing the prescription; to the second plea, that *Anne Cowlishaw* did not grant *modo et formā*; and to the *third* plea, denying the common highway.

At the trial before *Garrow, B.*, at the last *Lent* Assizes for the county of *Leicester*, the first plea was disproved, it appearing that all the ancient roads over the *locus in quo* had been extinguished by an inclosure act; and the Jury negatived the common highway pleaded in

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the third plea. The case, therefore, depended on the second plea, and upon that plea there was conflicting evidence as to the exercise of the alleged right of way. The plaintiff offered evidence of old deeds, and of a will, to shew that *Anne Cowlishaw* had only an estate as a co-trustee with one *Farnell*, in trust for *Anne Cowlishaw's* son, who, at the time of the supposed grant, was a minor; and he contended that this evidence was admissible on the issue in question, for the purpose of shewing that *Anne Cowlishaw* was not likely to have made the grant, not having had any legal right so to do. The defendant's counsel objected to the evidence, on the ground that *Anne Cowlishaw's* seisin in fee was admitted on the record, and that the plaintiff was estopped, by the state of the pleadings, from giving any evidence to negative that fact. The learned Judge received the evidence, reserving the question of its admissibility for the opinion of the Court. The defendant then offered evidence of an award of the *locus in quo*, made under an inclosure act, to *Anne Cowlishaw*, which alone, they contended, vested the soil in her; but which, the plaintiff contended, vested it in the persons in whom the legal estate in the land, to which this allotment was made, had been before vested under the will (a). The learned Judge left the whole of the evidence to the Jury, and directed them to consider whether there was such evidence of the use of the right of way, as to lead them to suppose that *Anne Cowlishaw* had made the grant in question; and he told them, that they might assume, for the purposes of their verdict, that she had a legal right to make such grant. The Jury found a verdict for the defendant upon the second plea.

Balguy had obtained a rule to enter a verdict for the

(a) As to this point, which it the principal case, see *Doe dem. became unnecessary to decide in Sweeting v. Hellard*, 9 B. & C. 789.

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plaintiff on the second plea, or for a new trial, against which cause was now shewn by—

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Denman, R. N. Clarke, and Humfrey (a).—On these pleadings, the only question was on the grant, as no issue was taken on the seisin of *Anne Cowlishaw*, as alleged in the second plea. If the plaintiff on this issue could be allowed to give in evidence documents to disprove the seisin of *Anne Cowlishaw*, which documents are in his exclusive possession, and the contents of which were unknown to the defendant, the latter would have been entirely misled, as he would only come prepared to prove the grant. The plaintiff could only traverse one of the facts alleged in the plea. If he attempted to put more than one in issue, the replication would have amounted to the general replication of *de injuriâ*, which is clearly bad in such a case. *Crogate's case (b)*, *Cockerell v. Armstrong (c)*. It was not competent for the plaintiff to give any evidence to negative any part of the plea, which was admitted by the traverse being taken on another allegation. This would give him the advantage of the general replication of *de injuriâ*. The plaintiff had his choice which allegation to traverse; and if he is allowed, on a traverse of one allegation, to dispute another, there is no reason why he may not dispute the whole plea, which he clearly cannot do, as *de injuriâ* cannot be replied, when an easement or other interest in the land is claimed. The present is a strong case to shew the good policy and utility of the rule of law contended for by the defendant, for the real merits arise on the allegation of the seisin in *Anne Cowlishaw*, equally as if it had been laid in any other person; and if the allegation of seisin in *Anne Cowlishaw* had been traversed,

(a) The arguments, as to the right of *A. Cowlishaw* to grant, are omitted, as the judgment of the Court proceeded entirely on the question of the admissibility of the

evidence, on the issue taken upon the grant.

(b) 8 Rep. 66.

(c) Willes, 99.

the only effect would have been to have caused the defendant to amend, by adding pleas, laying the seisin in different persons; and the same evidence which was produced at the trial to prove the grant by *Anne Cowlshaw*, would equally have proved a grant alleged to have been made by any other person who might appear to have been the owner of the fee. There is no such principle as that which was contended for by the other side, that a party may be estopped by an admission on the record for one purpose, and not for another, in the same cause. In the present case, the seisin of *Anne Cowlshaw* was admitted on the record, and the plaintiff was estopped from giving any evidence in contravention of that admission. The evidence, therefore, was clearly inadmissible, and the defendant is entitled to retain his verdict.

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Balguy and Clinton, contra.—The evidence in question was admissible, not to contradict the allegation on the record, but to negative the fact of *Anne Cowlshaw* having made the grant. The user is only presumptive evidence of the grant; and it was competent for the plaintiff to shew that *Anne Cowlshaw* was not seised in fee, and could not, therefore, in point of law, have made such a grant. She ought not to be presumed to have done an act contrary to law. The question for the Jury was purely one of fact, whether the deed was or was not made. There is a distinction between presumptions of law and of fact. The latter may always be rebutted by contrary evidence. The question, whether a particular deed ever had existence, in cases like the present, is of the latter class. The principles on this branch of the law are thus stated by a learned author (a):—"The presumption of right in such cases is not conclusive, in other words, it is not an inference of *mere law*, to be made by the Courts; yet it is an

(a) Starkie's Evid. 1214.

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inference which the Courts advise Juries to make whenever the presumption stands unrebutted by contrary evidence. Such evidence in theory is mere presumptive evidence." The same learned writer (a), citing *Barker v. Richardson* (b), lays down in another passage the law on this subject in the following terms: "The technical presumption necessarily assumes that it was practicable to transfer the right by means of a grant or other conveyance; hence the presumption does not operate where such a grant could not, from the nature of the case, have been made." In the present case *Anne Cowlishaw* could not legally have made the grant in question; and even if the evidence had been all one way, as to the user of the right of road, the presumption of the grant would have been rebutted by the evidence which was offered of the state of the title at the time when the alleged grant was supposed to have been made. The learned Judge, therefore, ought to have directed the Jury to find a verdict for the plaintiff on the second plea; and, at all events, he ought not to have told the Jury that they might assume, for the purposes of their verdict, that *Anne Cowlishaw* had the legal right to make the grant. That direction was calculated to lessen the effect of the evidence on the minds of the Jury, and entitles the plaintiff at least to a new trial.

Cur. adv. vult.

VAUGHAN, B.—This was an action of trespass *quare clausum fregit*, in which the defendant pleaded no general issue, but three special pleas: *first*, a prescriptive right of way; *secondly*, that *Anne Cowlishaw*, being seised in fee, granted a right of way by lost deed; and *thirdly*, a common highway. The first and third pleas were properly negatived on the evidence which was given at the trial, and the only question therefore was upon the second plea, upon which the Jury found a verdict for the defendant. The

(a) Starkie's Evid. 1218.

(b) 4 B. & A. 579.

present is an application, on the part of the plaintiff, to enter a verdict upon the issue on the second plea, or for a new trial: in the consideration of which question, it becomes material to refer to the second plea, and the issue upon that plea. The second plea states, that *Anne Cowlshaw* was seised in fee, and, being so seised, granted the way in question by lost grant; and the replication to that plea is, simply, that she did not grant *modo et formâ*. It was competent for the plaintiff to traverse either the seisin of *Anne Cowlshaw* or the grant by her. The former is traversed, and therefore it seems to me and to the Court, that it must be taken against the plaintiff conclusively that she was seised in fee. But it was contended for the plaintiff, that the evidence was admissible, not to disprove the seisin of *Anne Cowlshaw*, but, as an ingredient, to rebut the existence of the grant, which was a mere presumption of fact; because, if she had no authority to grant, it was unlikely, under such circumstances, that she should have made the grant. It is a satisfactory answer to this argument, that the plaintiff is estopped by the state of the pleadings, and therefore cannot be received to contradict that which is admitted upon the record. Under these circumstances, evidence to negative the seisin of *Anne Cowlshaw* was not properly receivable, and therefore the learned Judge was perfectly correct in directing the Jury to presume, for the purposes of their verdict, that *Anne Cowlshaw* was seised in fee. We therefore think, that the rule to enter a verdict for the plaintiff should be discharged; but, as there seems to have been conflicting evidence in this case, and as the verdict might affect the inheritance, the plaintiff may have a new trial, upon payment of costs, the defendant being at liberty to amend his pleadings as he shall be advised.

Rule accordingly.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EXCHEQUER OF PLEAS, TRINITY TERM, 11 GEO. IV. & 1 WILL. IV.

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LOADER, *qui tam*, v. THOMAS.

By the practice of this Court, where a new trial is granted, the party who succeeds upon both trials is entitled to the costs of both trials, if the rule for the new trial is silent upon the subject of costs.

In an action upon a statute which gives double costs, if a new trial be granted, nothing being said upon the subject of costs, the party who succeeds upon both trials is entitled to double costs of both trials.

DEBT for penalties upon the coal act, 47 Geo. 3, c. 68. The cause was twice tried. Upon the first trial, the plaintiff recovered a verdict. The Court granted a new trial, but the rule was silent as to the costs. Upon the second trial, the plaintiff again recovered a verdict; and the Master, in the taxation of costs, allowed the plaintiff double costs of both trials under the above stat. s. 150.

On a former day, *Thesiger* moved for a rule calling upon the plaintiff to shew cause why the Master should not review his taxation. He stated, that the costs of the first trial would not be allowed by the practice of the Court of

King's Bench, although the practice of the Court of *Common Pleas* was different; and he contended, that the practice of the former Court was more reasonable than that of the latter. He further insisted, that, at all events, the Master should allow but the single costs of the first trial; as that had been set aside.

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But the Court, after consulting the Master, were of opinion, that the plaintiff was, in such a case, entitled, by the practice of this Court, to the costs of both trials, where the rule is silent as to the costs (a); and therefore granted the rule upon the latter ground only.

Gurney now shewed cause.—By the practice of this Court the plaintiff is entitled to the costs of the former trial. In this respect, the practice of this Court and of the Court of *Common Pleas* differs from that of the Court of *King's Bench*. The costs of the former trial are therefore costs in the cause, and it makes no difference whether they be single or double costs. As the statute upon which this action proceeds gives double costs, it is clear that the plaintiff, if he be entitled to costs at all, is entitled to double costs.

Thesiger, contra.—It must be admitted, that where the rule is silent as to costs, the costs of both trials are to be allowed to the party who is successful upon both trials. But the plaintiff is only entitled to single costs of the first trial in this case. Upon this point there is no decision; and upon principle, the defendant ought not to be saddled with double costs of a trial, which the Court has decided to be no trial. Double costs being in the nature of a penalty are given as the consequence of a binding trial only.

GARROW, B.—The practice of this Court has very pro-

(a) See Hullock on Costs.

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perly been admitted to be as stated by the Master when the rule was moved for, but the learned counsel contends that the first trial was no trial. That is assuming too much, for, in granting a new trial, the Court only considers that the question is fit for further consideration. In that case, common sense and justice go along with the practice, which gives the party the costs of both trials in which he has succeeded. I cannot adopt the suggestion of there being a different rule for the taxation of the costs of the two trials. I am therefore of opinion that this rule should be discharged.

VAUGHAN, B.—I am of the same opinion. It appears to me that the act of Parliament and the practice are imperative upon the Court. The statute in question gives double costs. Under the statute of *Gloucester*, I apprehend that the party would not be entitled to costs (a); and therefore, if he be entitled to costs, it must be under the act of Parliament upon which this action is founded, which gives not only the costs of suit but double costs. The practice of this Court is admitted to differ from that of the Court of *King's Bench*; because, in the latter Court, unless something be said with respect to the costs, the party succeeding upon the first trial is not entitled to the costs of that trial, if he be successful upon the second investigation of the case. But in the Court of *Common Pleas*, and in this Court, the rule is different; and the party who suc-

(a) Where the statute gives a penalty to the party grieved, to be recovered by action, bill, plaint, &c. this being a duty to the party, vested before action brought, he shall have costs against the defendant, because he is put by the defendant to the costs and trouble of a suit; but, in a *tam quam* or other popular action, where the duty is not vested till

the suit or information, there his interest commencing by the suit, and not by a debt vested before, he shall not have costs against the defendant. *Company of Cutlers in Yorkshire v. Ruslin*, Skin. 363, cited *per* Lord Tenterden, C. J., in *The College of Physicians v. Harrison*, 9 B. & C. 529.

ceeds upon both trials is entitled to the costs of both, if the rule be silent as to costs. It is competent for the Court, on granting a rule for a new trial, to give a special direction with respect to the costs, if there be any hardship in the case; but nothing of that description was done in this case. These costs are regulated by the act of Parliament, and there is no difference between single and double costs. It is admitted, that, in this Court, the costs of both trials are costs in the cause, and the act of Parliament gives double instead of single costs.

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BOLLAND, B.—I agree with the rest of the Court. The statute gives us no discretion, but fetters us. If we could exercise a discretion here, we might be equally called upon to exercise our discretion to deprive the plaintiff of single costs in a case of peculiar hardship. We are, however, bound by the act of Parliament, and the rule must be discharged.

Rule discharged.

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DEBT for tolls. At the trial, before *Alexander*, L. C. B., at the *Middlesex* Sittings after *Michaelmas* Term, 1829, the Jury found a verdict for the plaintiffs, subject to the opinion of the Court upon the following case—

Queen *Anne*, by her grant, bearing date in the 13th year of her reign, reciting, that by a writ of *ad quod damnum*, and inquisition thereon, it had been found that it would not be to the prejudice &c., if the Queen granted to the mayor, aldermen, and capital burgesses of *Stamford*, and their successors, licence to hold two fairs or markets yearly for ever, *viz.* one of the said fairs on &c., and the other of the said fairs on the *Monday* next preceeding the 1st day of *May*, for the buying and selling of all and

A grant of a fair or market, with an express grant of toll, passes reasonable toll, though no amount of toll be specified.

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all manner of cattle and sheep, and all and all manner of goods, wares, and merchandize, commonly sold and bought in fairs, "*una cum curiâ pedis pulverizati ac tolnetis et proficuis exinde provenientibus et emergentibus,*" granted to the said mayor and corporation licence to hold within the said town two fairs, in the terms of the inquisition, "*una cum curiâ pedis pulverizati tempore feriarum predictarum, ac cum omnibus tolnetis et aliis proficuis predictis feriis sive nundinis pertinentibus et spectantibus;*" to have, hold, and enjoy the said fairs or markets and court of piepowder, "*et cætera premissa,*" to the same mayor, &c.

In pursuance of this grant, the corporation had from the period of the grant regularly held the fairs therein mentioned, and had been accustomed to receive a toll of *2d. per* beast from the buyer for every beast bought in the fair. At the *May* fair, held according to the charter in the year 1828, the defendant purchased eight beasts, for which the toll, amounting to *1s. 4d.*, was regularly demanded of him by the plaintiffs, but which toll the defendant refused to pay.

The charter was in the following terms:—

REGINA omnibus ad quos &c. Saltem. Cum per quandam Inquisitiōem indentat. capt. apud Bourne in Com. nro. Lincoln, quinto die Aprilis, anno regni nri decimo tertio, virtute cujusdam Bris. nri de ad quod dampnū e Cancellaria nra nup emanat. Vicecomit. comitatus p̄dict. direct. et Inquisiconi p̄dict annex. p sacramentū pbom et legiti hoium comitatus p̄dict. comptum sit, quod non esset ad dampnū vel p̄judiciū nri aut alicujis al. psone, nec ad nocumentum vicinarū feriarū sive nundin. si nos concederemus Majori, Aldermannis et Capitāt Burgensibus Ville sive Burgi de Stamford in Bri p̄dicto noīat. et successoribus suis, Licenciam quod ipsi hērent et tenerent infra villam sive burgum de Stamford p̄dict. et p̄cinct. ejusdem duas Ferias

sive Nundin. annuatim inppm (vixt.) unam dictarū Feriar. sive Nundin. sup quemlibet diem Martis pxim. pceden. festum sive diem Purificationis Bte Marie Virginis, Anglice Candlemas-day, et alteram duarū Feriarū sive Nundin. super Diem Lune pxim pceden. primū diem Maii pro empcone et vendicōne oium et oimod Averioꝝ et Pecoꝝ ac oium et oimod. Bonoꝝ Mercimonioꝝ et Mercandisarū coīter in Feriis sive Nundin. empt' et vendit. una cum Cur. Ped. Pulverizat. ac Tolnet et profic exinde pvenien. et emergen. put p dict. Bre. et Inquisicon. in filaciis Cancellarie nre. pdict de recordo remanen. plenius liquet et apparet. Sciatis modo Quod Nos de gratia nostra spiali, et ex certa sciencia et mero motu nris, dedimus et concessimus, ac p p'sentes pro nobis, heredibus et successoribus nris, Damus et concedimus p'fat. Majori, Aldermannis, et Capital. Burgensibus Ville sive Burgi Stamford in com. nro. Lincoln pdict. et successoribus suis, Licentiam quod ipsi habeant et teneant infra Villam sive Burgum de Stamford pdict. et p'cinct. ejusdem duas Ferias sive Nundin. annuatim inppm (viz.) unam duarū Feriarū sive Nundin. super quemlibet Diem Martis pxim pceden. festum sive diem Purificationis Bte Marie Virginis, Anglice Candlemas-day, et alteram duarū Feriarū sive Nundin. super Diem Lune pim pceden. primū diem Maii pro empcone et vendicōne omim et omimod. Averioꝝ et Pecoꝝ ac omiū et oimod. Bonoꝝ Mercimonioꝝ, et Mercandisarū coīter in Feriis sive Nundin. empt. et vendit. una cum Cur. Ped. Pulverizat. tempore Feriarū p'dict. ac cū oībus Tolnet. et al. Profic. p'dictis Feriis sive Nundin. p'tinen. et spectan. Habend. tenend. et gaudend. p'dict. Ferias sive Nundin. et Cur. Ped. Pulverizat. et cetera p'missa sup'ius p p'sentes concess' seu mencōnat. fore concess' eisdem Majori, Aldermannis et Capital. Burgensibus Ville sive Burgi de Stamford pdict. et successoribus suis, ad eoꝝ solum et ppriu opus et usum inppm. Et hoc absq. aliquo computo vel aliquo alio debito nobis, heredibus vel successoribus noīs pind reddend. solvend. vel faciend. Quare volumus, ac per presentes pro nobis, heredibus, et successoribus nris firmiter injungendo p'cipi-

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mus et mandamus quod p'dict. Major, Aldermanni. et Capital. Burgenses Ville sive Burgi de Stamford p'dict. et successores sui habeant, teneant, et custodiant, et h're, tenere, et custodire valeant et possint, imp'ym p'dict. Férias sive Nundin. una cum Cur. Ped. Pulverizat. et ceteris p'missis p'dcis, sc'm tenorem et veram intencōnem har' Lraz nroz Patenciā absq. molestacōne, perturbacōne, gravamine, sive contradiccōne nr. heradum vel successor' nroz, vel aliquoz Vicecomitum, Escatoz, Ballivoz, Officiarioz sive Ministrorum nroz heradum vel successorum eoz quorumcumq. Et hoc absq. aliquo al. Warranto, Bri vel p'cess. imposterum in ea parte p'curand. vel obtinend. Et Ulterius volumus ac p' p'sentes pro nobis, heredibus, et successoribus nris, concedimus p'fat. Majori, Alderman, et Capital. Burgensibus Ville sive Burgi de Stamford p'dict. et successoribus suis, quod he Lre nre Patentes vel Irratulament. eaydem sint et erunt bon. firm valid. sufficien. et effectual. in lege eisdem Majori, Aldermannis et Capital. Burgensibus Ville sive Burgi de Stamford p'dict. et successoribus suis, secundum veram intencionem earundum. In cujus rei &c. Teste Regina apud West. decimo quinto die Junii.

Per Bre de Privat. Sigill.

The question for the opinion of the Court was, whether the above toll could be lawfully taken under this grant.

Taunton, for the plaintiffs.—The objection to be made on the part of the defendant is, that no sum certain is stated in the grant of the toll in question; and that no such grant can be good, unless the amount of the toll be specifically set forth. To support this objection several cases will be cited, which, upon examination, will be found not to apply. It may be admitted as a general proposition, that toll is not necessarily incident to a fair or market, by which must be understood, that toll will not pass by a general grant of market, without more, but, to enable the grantee to take toll, there must be an express grant of toll.

This is laid down by Chief Baron *Comyns*, title *Toll*. But it is denied that the amount of the toll need be stated in a grant of a fair or market. In the case of a toll thorough or turn, which is against common right, the amount of the toll must be specified, but the toll of a fair or market is not contrary to, but consonant with, common right. The distinction is, that the amount of toll in a fair or market need not be specifically mentioned in the grant; whereas, in the grant of a toll thorough, or other toll against common right, the amount of toll to be taken must be specified. *Heddy v. Wheelhouse* (a), is the first case in order of time, which will be relied upon by the defendant. The facts of that case were the following:—King *Henry 7th*, granted to the mayor and burgesses of *Northampton*, *unam feriam annuatim* to be holden *cum omnibus libertatibus ad hujusmodi feriam spectant. vel pertinent.* The question was, whether toll passed under these words. *Popham, Gaudy*, and *Fenner*, held not; for, by the words, *cum omnibus libertatibus*, toll is not demandable; for it is not incident to a fair, but the grantee must have it by express words when it is a new fair: if there had been a fair by grant or prescription, whereto toll had been paid, and it became forfeited to the king, and the king then grants it *cum omnibus libertatibus ad hujusmodi feriam spectant.* the grantee should have toll, for toll was formerly belonging thereunto. The amount of this case is, that as toll was not mentioned in the grant, and the general words *cum omnibus libertatibus et consuetudinibus &c.* did not include toll, and no such word as *tolnetis &c.* was used, the toll did not pass, according to the opinion of the three Judges, toll not being necessarily incidental to a fair. They held that the grantee must have toll by express words, where the fair is new; although, if a fair by grant or prescription, to which a moderate toll is annexed, be for-

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feited to the king, and the king grant it out *cum omnibus libertatibus et consuetudinibus &c.*, the grantee shall have the toll. In *Heddy v. Wheelhouse*, therefore, the decision was merely, that as there was no express grant, toll did not pass by the general words. The 2nd *Inst.* (a) on the stat. *West.* 1, will also be cited for the defendant. There it is laid down, that "if the king grant to a man a fair or market, and grant no toll, the patentee shall have no toll, for toll being a matter of private [advantage], for the benefit of the lord, is not incident to a fair or market so granted, without a special grant, as was adjudged in the case of *Northampton*." This is merely a recognition by Lord *Coke* of the former case, which it is unnecessary for the plaintiff to dispute. The case of *Holloway v. Smith* (b) is to the same effect, and carries the doctrine no further than the case of *Heddy v. Wheelhouse*. That was an action of trespass, in which the defendant justified for toll, and set out a custom in *Daventry* to hold a fair on *St. Matthew's day*, and to take toll, and that Queen *Elizabeth*, reciting this, granted two new fairs on two other days, with all profits, commodities, emoluments, liberties, and free customs *ad hujusmodi ferias pertinent*. On demurrer, the justification was holden bad, for toll is not incident of common right, and therefore not within the words of reference; and being new fairs, upon which no toll is granted by express words, the custom cannot extend them. *Holcroft v. Heel* (c), was decided upon a collateral point. That was an action on the case for erecting a new market to the injury of the plaintiff's market. The grant under which the plaintiff claimed was made in the 10 *W.* 3, in these words: "*dedimus et concessimus &c. prefat. F. M. et heredibus, quod habeant et teneant unum mercatum, ac etiam duas ferias sive nundinas annuatim &c. una cum curia pedis pulverisati, ac omnibus libertatibus,*

(a) 220.

(b) 2 Str. 1171.

(c) 1 B. & P. 400.

liberis consuetudinibus, potestatibus, custumagiis, theloniis, stallagiis, piccagiis, et aliis commoditatibus ad hujusmodi mercatum, ferias, sive nundinas, et curiam pedis pulverizati pertinentibus sive spectantibus." The objection was taken, that no specific toll was mentioned in the grant, but no judgment was given upon that point, the Court deciding that the plaintiff was barred, the defendant having held his market for twenty-three years without interruption. In *Osbuston v. James* (a), there was a grant of two fairs by *Jac.* 1, *cum curia pedis pulverizati, cum omnibus et omnimodis tolnet. thelon. custum. consuetud. juribus, jurisdiction. proficuis, privileg. advantag. commoditat. et emolument. quibuscunque ad hujusmodi ferias et cur. pedis pulver. pertinent. sive spectant. appendant. sive consuet.* The exception was taken there that toll was not expressly granted, and the passage from the 2 *Inst.* was cited. Toll was, however, clearly granted by express words, but the objection must have been that the amount was not specified. The Court gave no judgment on this point, as they thought the replication, that the plaintiff, as an inhabitant of the duchy of *Lancaster*, was by prescription free from payment of toll throughout the realm, good. In the case, however, of *Lightfoot v. Lemett* (b), the Court held the grant bad for uncertainty. That was an action of trespass for taking two steers, the defendant justified by virtue of the king's patent of grant to him and his heirs, that he should take at two bridges within his manor of *Doncaster*, called *St. Mary's Bridge* and *Willow Bridge*, such toll for the passage of beasts as is used to be taken *ibi et alibi infra regnum Angliæ*, rendering rent *per annum*, and avers that at *Boroughbridge in Com. Ebor.* there was used to be taken sixpence for every score of beasts there passing; and therefore, one shilling toll for the passage of forty beasts; he justifies *et prays aide de Roy*. The plaintiff replies,

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(a) Lutw. 1377.

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that, at these bridges, never any toll used to be taken; whereupon it was demurred. And now, after argument, it was adjudged that he should be ousted &c. *de aide*; for the grant of such toll which is taken *ibi et alibi infra regnum Angliæ* is uncertain and void; also the patent that he should have such toll which had been used to be paid *ibi vel alibi*, &c. and he averring payment at another place, but not there, it was therefore ill: wherefore it was awarded that he should answer &c. That decision proceeded upon the uncertainty of the toll described. It does not apply to the present case, because, here, there are express words granting the toll, and the only objection is, that the amount of the tolls is not expressly stated. With respect to this objection, the case of the Corporation of *Maidenhead*, recognized by Chief Baron Comyns, tit. *Toll E.*, is an express authority for the plaintiff. "If the king grants a fair or market, he may also grant to the grantee to take a reasonable sum for toll (a):" and the grant will be good though the charter does not express the sum in certain (b). The case, therefore, is of very considerable authority, being sanctioned by that learned author, who states, positively, that the grant is good. That case, which is reported in *Palmer* (c), was a *quo warranto* against the Corporation of *Maidenhead*, claiming certain privileges and franchises, and a market, with pickage, stallage, toll, &c., and it appeared that *Henry 6th*, by his charter incorporating *Maidenhead*, granted to them and their successors, *quod haberent mercatum quolibet die lunæ prout ante habuissent, simul cum tolato, pickagio, stallagio, cum omnibus aliis commoditatibus et emolumentis ad hujusmodi mercatum accidentibus, emergentibus, sive contingentibus*. The objection was, that the toll ought to be specially granted, as toll was not incident of common right. *Montague, C. J.*, held, that the grant ought to appoint how much should be taken for toll, how much

(a) *Palm.* 76.

(b) *Mo.* 474.

(c) *Per* 3 Just. *Mont. contra*,
Pal. 86.

for pickage, and how much for stallage. *Newberry*, who was counsel in the case, said, that the opinions of the three Judges were, that the toll was well granted, notwithstanding the amount of money to be paid for toll was not expressed; but *Montague*, C. J., was contrary. Also, he said, that no judgment was given for the king in this case, but that the Corporation should enjoy their privileges notwithstanding this action brought. In that case, several instances are put of grants similar to the one then in discussion, and almost every market-toll in the country is held by the same tenure. In the charters which have come before the Courts in modern cases, the grants are in terms nearly similar to the present. In *Prince v. Lewis* (a), which was an action that excited great interest, the grant of *Charles 2nd*, was only a general grant of tolls. The Court of *King's Bench* there held, that the action was not maintainable, because the market had been applied to other objects, and sufficient room was not left for the purposes of the market. But there would have been a much shorter mode of deciding that case, if the defendant could have said the grant is void because it does not mention the amount of the tolls. In *Curwen v. Salkeld* (b), the terms of the grant, as set forth in the report, contain no specification of the amount of the toll, but are similar to the grant in question. There are many other instances to be found in the Reports, in which the grants are general, like the present. To hold the present grant bad, would therefore overturn almost every market-toll in the country.

It may be said, however, that such a general right to take tolls without limitation may be liable to abuse, as there is nothing to prevent the oppression of the king's subjects. This argument cannot prevail, because any such abuse would incur a forfeiture of the franchise. Outrageous toll is contrary to the law of the land, and is

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(a) 5 B. & C. 363.

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expressly prohibited by the stat. *West.* 1, c. 31; and it is laid down in all the books, that such abuse incurs a forfeiture. It is not an answer to this argument to ask, who is to put the Attorney-General in motion, because the grantee is not only liable to an information at the suit of the Crown, but also to a special action on the case by any frequenter of the market who has paid toll (a).

Denman, for the defendant.—The present grant is too uncertain for any person to derive any certain interest under it. "Everyone," says Lord *Coke* (b), "that hath a fair or market, ought to have it by grant or prescription. If the king grant to a man a fair or market, and grant *no toll*, the patentee shall have no toll; for toll, being a matter of private [advantage] for the benefit of the lord, is not incident to a fair or market so granted, without a special grant, as it was adjudged in the case of *Northampton*; for such shall be accounted a free fair or market; and there it was also adjudged, that after such a grant made, the king cannot grant a toll to such fair or market, without *quid pro quo*, some proportionable benefit to the subject. Lastly, it was there resolved, that if the toll, granted with the fair or market, be unreasonable or outrageous, the grant of toll is void, and the fair or market free." The position for the defendant is, that, to entitle a grantee to toll, there must be a *certain* toll granted. It is conceded by the other side that toll is not incident to a fair or market of common right, and that there must be an express grant of toll. In the case of *Heddy v. Wheelhouse* (c), the word "toll" was not used, but the word *consuetudinibus*, the word used, would have carried toll, had there been any thing in that grant to which *consuetudinibus* might have been referred, to make the grant certain. That case, therefore, does not turn on the omission of the word toll, but on the uncertainty of the grant. It

(a) F. N. B. 94; 2 Inst. 220;
4 Rep. 94 b.

(b) 2 Inst. 220.

(c) Cro. Eliz. 558; Moor, 474.

is not a decision expressly in point, but is valuable as adopting the general principle, that the toll must be certain. In *Osbuston v. James*(a), there was no decision, but the doctrine of Lord Coke (b) was fully recognized. The expression at the end of that case is:—" *Nul toll est expressement grant per les lettres patens, et sans express grant nul est due per le ley, come 2 Inst. 220, et autres livres sont. Le grant ici est ove tous tolls &c. spectan. sive pertinen. appenden. sive consuet. talibus feriis, et nul toll est appendant ou appartenant al asc' fair, et ne poit estre dit accustome d' estre pay al asc' fair, forsque per prescript' de temp d'ont &c., que duisoit aver estre averr, et le ley ne prist asc' notice de ceo.*" The Court decided that the replication was good, without deciding upon the validity of the plea, and the expression in the case (admitting that the plea was good) does not mean that the Court decided it to be good, but, that, assuming it to be good, the replication was sufficient. *Holloway v. Smith*, and *Holcroft v. Heel*, do not touch the question. In *Lightfoot v. Lennet*, however, the Court went much farther; for, in that case, the grant was of such toll as was used to be taken *ibi et alibi* in *England*, which at least had reference to something. The pleadings referred to the usage of a neighbouring bridge, and yet the Court held the grant uncertain and void. That grant, however, was much less uncertain than the present. There was something, which, by reference, would make the toll certain, and therefore that case is a distinct authority for the defendant, and entitled to far more consideration than the case of the Corporation of *Maidenhead*, which, at best, is but the judgment of three Judges, against the opinion of the Chief. The grant in that case is a grant of tolls, *prout ante habuissent et nunc habent*, and so had a distinct reference to the amount of toll which had been before, and then was, received. The plea contained an aver-

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(a) Lutw. 1377.

(b) 2 Inst. 220.

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ment that a toll certain had been collected for some years. There was a demurrer on the ground of uncertainty, and the Court decided that the grant was not uncertain, because the amount of toll is easily ascertained, the toll being granted as it had been received, and the averment shewing what amount had actually been received. Under these circumstances, *Montague's* judgment is strong to shew how far the doctrine of certainty with respect to tolls was carried by him, but the decision of the other three Judges does not affect the argument for the defendant, because the averment in the plea gave a standard by which the toll to be taken could be ascertained. It would be inconvenient to make the reasonableness of toll a matter of inquiry under a grant like the present. On the question of such reasonableness, would the toll be variable from time to time according to circumstances, or would it be one invariable fixed sum at all periods? An unreasonable toll may not be outrageous, at least not so as to fall within the statute of *West. 1*, to incur a forfeiture of the franchise.

The words of the grant are the tolls &c., *prædictis feriis* belonging: but these are new fairs. What then can be said to be the toll belonging to them? Nothing could belong to them, and therefore nothing could be granted. The present grant does not contain the words "*hujusmodi feriis*," which might be said to refer to the fairs in the neighbourhood.

Certainty is required, not only in a grant of tolls but in every other grant. A grant shall be void if it be totally uncertain (a). But if the king's grant refer to another thing which is certain, it is sufficient; for *id certum est quod certum reddi potest*, as if he grant to a city &c. all liberties which *London* has, without saying what liberties *London* has (b). But it is otherwise where there is nothing to satisfy the words of reference, as if the king grant to another

(a) Com. Dig. (E) 14.

(b) Com. Dig. Grant (G) 5.

to hold pleas before his bailiffs &c., and he had no such officers before the grant, he cannot make them (a). There is a distinction between the case of a grant by a private person of his own property, and a grant by the king of a charge upon his subjects; in the former case, it is to be construed against the grantor; in the latter, it must be construed most strictly for the subject. But even were this the case of a grant between subject and subject, the words would be insensible and the grant void. It is, however, a grant from the Crown, which has reference to something not in existence, and therefore there is nothing with which the subject can be charged.

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Tasnton, in reply.—There is no express mention of *toll* in any of the cases alluded to, except in the case of the Corporation of *Maidenhead*, upon which the plaintiffs rely; and that was the ground upon which in all the other cases it was holden that the claim could not be supported. The case in *Palmer* is entitled to consideration, and should give the rule in the present case, as all the other decisions are distinguishable, and no contravening authority has been produced. Many instances of grants of tolls in general words like the present, have been adduced for the plaintiff; but for the defendant no grant of market toll or fair toll has been or can be shewn, where the exact sum is specifically set out.

As to the argument for the defendant, from the difficulty and inconvenience which it is supposed might arise on the question of what toll is or is not reasonable under such a grant; it should be observed, that just the same inconvenience and difficulty would arise though the amount were specified, as the king cannot grant an unreasonable toll, and it must always be a question under every grant which specifies a sum certain, whether such sum be or be not a reasonable toll.

Cur. adv. vult.

(a) 2 Roll 196, C. 41.

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ALEXANDER, L. C. B., now delivered the judgment of the Court:—

This was an action in which the Corporation of *Stamford* sought to recover from the defendant, as the purchaser of eight beasts, at a fair holden at that borough immediately before the 1st day of *May*, 1828, the sum of 1s. 4d., after the rate of 2d. for each beast.

At the trial, before me, in the county of *Middlesex*, the Jury found a verdict for the plaintiff, subject to the opinion of the Court on a special case. The case states a charter of Queen *Anne* in the 13th year of her reign, by which her Majesty grants to the Corporation of *Stamford* a licence to hold two fairs or markets yearly, one of the fairs on the *Monday* next preceding the 1st day of *May*, for the buying or selling of cattle and sheep, and other goods and merchandize, with a court of pie-poudre, and the tolls and profits from the fair and court proceeding and arising. I shall have occasion, presently, to state with more exactness the terms of this grant. The case then proceeds further to state, that, in pursuance of this grant, the Corporation have, from time to time, regularly held the fairs therein mentioned, and have been accustomed to receive a toll of 2d. *per* beast, from the buyers of every beast sold in the market. It further states the purchase by the defendant of the eight beasts, and demand of the toll in question, and a refusal by the defendant to pay it.

It is not disputed, that, from the date of the charter to the present time, the precise toll now claimed has been actually received: neither is it contended, that this is an unreasonable toll. It is admitted, that, if the Corporation have authority to levy any toll, the amount of this toll furnishes no objection to it. The present point which has been discussed is this: whether, when the Crown grants a fair or market, with accustomed tolls, but without specifying any particular sum or occasion, the grantee may re-

quire upon certain transactions a reasonable toll. The plaintiffs assert the affirmative of this proposition, and the defendant asserts the negative.

It was admitted on the part of the plaintiffs, in the course of the discussion, that the grant of a fair or market, with the usual *liberties*, or *customs*, *privileges*, or *profits*, would not authorize the grantee to levy even a reasonable toll. On the other hand, it was admitted on the part of the defendant, that if the sovereign granted a fair or market, with toll, specifying the sum and the occasion, and it was not unreasonable, the grantee would be entitled to recover it. The controversy has arisen here, because the circumstances of this case are different from both of those to which I have referred. It is mesne between them. The claim is founded, not on a grant of a fair or market, with only the general words, "liberties, privileges, customs, or profits," but the word "tolls" is expressly introduced into it. On the other hand, no authority is given to require and take any sum distinctly specified.

The question then is, whether, when the Crown grants a market with tolls, not specifying them, the grantee can require any? It is proper first to mention the documents which raise this question. A writ of *ad quod damnum*, in the 12th year of Queen *Anne's* reign, required the Sheriff of *Lincoln* to inquire by the oaths of lawful men, whether, if she granted to the corporation of *Stamford* licence to hold within the town and borough of *Stamford*, two fairs or markets for buying and selling beasts, and cattle, and other goods and merchandize commonly in fairs and markets bought and sold, together with courts of pie-poudre, and tolls and profits therefrom arising and happening, it would be to the prejudice of her majesty, or others, or of neighbouring fairs and markets. The inquisition is produced, and it returns that it will not be to the prejudice of the queen or any other person, or of the neighbouring fairs or markets, if the queen should grant to the Corporation licence to hold

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within the borough two fairs or markets for buying and selling all beasts and cattle, and all manner of goods, wares, and merchandize commonly sold in markets, together with courts of pie-poudre, and tolls and profits therefrom arising and happening. The charter recites the inquisition, and grants the fairs and court of pie-poudre, with all tolls and other profits, *ac cum omnibus tolmetis et aliis proficuis predictis feriis sive nundinis pertinentibus et spectantibus*. The controversy is, whether these words "*tolmetis predictis feriis sive nundinis pertinentibus*," can have any meaning or operation, where no specific toll or sum to be received is mentioned. It seems extraordinary, that such words should be introduced at all, if by law they must be entirely inoperative; and this would become more extraordinary, if the charters expressed in similar terms were very numerous. However, if this has been the rule laid down and acted upon, our duty would require that we should adhere to it. It is our duty *stare decisis*. What we have had therefore to ascertain is, whether, as it has been contended, the authorities have decided, that a grant of tolls *feriis pertinentibus* has no meaning or effect whatever, unless the charter also specifies the *amount* of the toll.

The earliest case which has been cited is that of *Heddy v. Wheelhouse*, reported in *Croke Elix.* 558, 591, about the year 1596. There the charter granted to the mayor and burgesses of *Northampton*, "*unam feriam cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi feriam spectantibus vel pertinentibus*." The argument for the plaintiff, who, in this case, resisted the toll, was, that there were not any words of grant of toll, that toll was not a liberty or custom of common right appertaining to a fair, and therefore that it passed not by the general words: "*cum omnibus libertatibus et liberis consuetudinibus*." The defendants, who sustained the toll, said, that toll was of common right. It was not decided

upon the first argument, but *Popham* said, toll was not incident to a fair. He added, "questionless, the king may grant a fair, and that toll shall be paid." When the cause came on again, three Judges, of whom Chief Justice *Popham* was one, were of opinion that these words "liberties and customs" did not authorize the demand of toll, because toll was not incident to a fair; but they were also of opinion, that, by express words in the King's grant, the grantee may have toll. This case is not useful to either party. It decides that the words "liberties and customs" will not carry toll. The Judges are of opinion, that the King may grant a fair with toll, and they do not say that the toll must be specified, and that such specification is essential to the grant.

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The next authority in point of time mentioned, is the passage from Lord *Coke's* commentary on the statute of *Westminster* 1, c. 31, p. 220 of the 2nd *Institute*, "every one that hath a fair or market, ought to have it by grant or prescription. If the king grant to a man a fair or market, and grant no toll, the patentee shall have no toll, for toll being a matter of private [advantage], for the benefit of the lord, is not incident to a fair or market so granted, without a special grant, as it was adjudged in the case of *Northampton*, for such a fair or market is accounted a free fair or market, and there it was also resolved, that, after such a grant made, the king cannot grant a toll to such a free fair or market, without *quid pro quo*, some proportionable benefit to the subject. Lastly, it was there resolved, that if the toll granted with the fair or market be outrageous or unreasonable, the grant of the toll is void, and that the same is a free market or fair." This opinion of that great lawyer is just as equivocal upon the point in question, as the case I have just mentioned, which is in fact the same case, on which his opinion proceeds. You see clearly, that if the king do not use the word toll, or some equivalent expression, the grantee shall have no toll, but you do

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not see that if the charter purports to grant toll, the amount must be specified.

The next case cited is that of *Lightfoot v. Lennett*, which occurred in the 15th Jac. the 1st, 1618, reported in 2nd *Croke*, 421. Nothing can be inferred from it other than that a grant of toll thorough, with such toll as used to be taken *there or elsewhere* in *England*, is void for uncertainty; the words are, *ibi et alibi infra Angliæ regnum*. The uncertainty here is manifest, and the ground of decision unanswerable. The grant did not specify a sum, but pointed at a measure, at a scale, which it was impossible to apply.

The case next in point of time is the case in *Palmer*, a *quo warranto* against the Corporation of *Maidenhead*, in the 17th of *James* the 1st, the year 1619. It is a long case, and many points were detailed in it. The abuse of the charter granted by the king was one of the grounds on which it was sought to repeal it, and among the abuses complained of was the taking toll. For the *quo warranto* it was contended, that toll is not incident to a market, that the patent ought to express what sum ought to be paid for the toll, otherwise it is void for uncertainty (p. 83); and the grantee of the market shall not be himself the judge how much he shall demand for toll. On the other side it was said, that there was a distinction between those tolls that are against common right, in which class are enumerated toll thorough and toll turn, (a toll taken on the return of cattle unsold from market), where the sum ought to be expressed in the charter, and tolls which are not against common right, as in a grant of a market with toll, where the toll is due, though the sum be not expressed. The result of the discussion upon this point is stated by the reporter, Sir *Gefrey Palmer*, to be, as he was informed by the counsel, "that the toll was well granted, though the quantity of money for each thing was not expressed, according to the opinion of three of the Judges

against the opinion of Chief Justice *Montague*; and that, in fact, the Corporation continued to enjoy their privileges." There is here the opinion of three Judges to one, on the very point. As to the result of the cause, the Crown failed in obtaining judgment in the action.

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The next authority in the order of time which has been cited is that of *Osbuston v. James*, from 2 *Lutwyche*, 1377, in the 4th year of *James* the 2nd. The book does not report much discussion either at the bar or upon the Bench, but states the opinion of the Court on the point which decided the cause. It was an action of trespass for seizing two lambs. The defendant pleaded in bar, a justification under a charter of *James* the 1st, by which that prince granted two fairs with a court of pie-poudre, with all and every sort of toll, *tolnetis et theoloniis*, followed by the usual words of customs, usages, rights, jurisdictions, profits, to the fairs or court of pie-poudre belonging or regarding. The plaintiff replied, that he was an inhabitant of the duchy of *Lancaster*, and that all the inhabitants of the duchy, from time whereof the memory of man is not to the contrary, were free and discharged from all tolls for their goods and chattels in all fairs and markets through the whole kingdom. To this replication the defendant demurred. It was objected to the plea in bar, first, that no toll was expressly granted by the charter. But the book states that the Court, admitting that the plea in bar was good, were of opinion that the prescription discharging the inhabitants of the duchy was also good, and therefore gave judgment for the plaintiff in the action. This certainly is no decision against the plaintiffs' argument, but rather inclines the other way; inasmuch as, in deciding, the Court rejects the ground of the invalidity of the charter, and proceeds upon the validity of the prescription, which is an answer to the claim of toll, though it had been legally granted.

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The next case is that of *Holloway v. Smith*, in 2nd *Strange*, 1171, in the year 1733. It is thus reported:—

“ In trespass, the defendant justifies a distress for toll, and sets forth a custom of *Daventry*, to hold a fair on St. *Augustine's* day, and take toll; that queen *Elizabeth*, reciting all this, had granted them two new fairs, one on the *Tuesday* after *Easter*, and the other on St. *Matthew's* day, with all profits, commodities, emoluments, liberties, and free customs, *ad hujusmodi ferias pertinentibus*. On demurrer, the justification was held ill, for toll is not incident of common right, and therefore not within the words of reference; and being new fairs, upon which no toll is granted by express words, the custom cannot extend to them; so the plaintiff had judgment.” It is clear, that this case is no authority against the Corporation. The word toll is not in the grant, and this case is in exact coincidence with those which had previously decided that the general words, profits, emoluments, and other equivalent words, will not supply the want of the word toll; but it does not decide, that, if that word be used and toll be given in direct terms, it may not be taken.

The next case cited in chronological order is *Holoroft v. Heel*, in the 1st of *Bosanquet* and *Puller's Reports*, 400, in the year 1709. It was an action on the case, for erecting a market within three miles of the plaintiff's market, whereby he lost a large sum of money, which he would otherwise have received for toll, stallage, and other commodities to his market belonging. Upon the trial, it appeared, that the plaintiff claimed by a charter, 10th *William* 3rd, granting a market and two fairs, together with a court of pie-poudre, “ *ac omnibus libertatibus, liberis consuetudinibus, potestatibus, custumagiis, theoloniiis,*” to such market, fairs, and court appertaining and regarding. Two objections were taken to the plaintiff's recovery, *First*, that as no specific toll was mentioned in the patent, the plaintiff was entitled to no toll, and there-

fore had sustained no injury. *Secondly*, that the defendant had had an undisturbed possession for twenty years, which was an answer to the action. The plaintiff was nonsuited: upon an application to set aside this nonsuit the Court were of opinion that the twenty years' undisturbed possession of the market by the defendant was a clear bar to the plaintiff's right of action. This is no positive authority for the Corporation, and certainly not against them. The Court distinctly selected the other ground.

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Pursuing the chronological order, the next case was *Curwen v. Salkeld*, 3 East, 538, in the year 1800. The question debated in this cause was not the question now before the Court. The controversy there was, whether the owner of a market was entitled to place it any where within boundaries particularly described, and, having held it upon one spot of ground, could remove it to any other within the proper boundaries, so as to prevent a stranger exposing his commodities upon the antient spot which was the soil of the owner of the market, in spite of that owner's prohibition. Though the point now in question was not debated in that case, yet it is well worth observation. The charter is, to a certain extent, set out in the report, and appears to have been to the same effect as the present. There is an authority to collect "*custumagia et theolonia per legem vel consuetudinem regni &c. in mercato aut feriis predictis debita vel consueta.*" So that it was open to the very objections now urged; and yet not only no observation was made upon that circumstance, but, it is apparent, that, in point of fact, tolls were received and had been received for a considerable time. The charter is of the 2nd James the 2nd.

The next case is *Lowden v. Hierons*, 2nd B. Moore, page 113, in the year 1818. This was an action on the case, by the lessee of *Covent Garden Market*, for tolls contended to be due to him. The material charter was of *Charles* the 2nd, containing a grant of the market, with all

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liberties and fees, customs, tolls, tributes, stallages, pickages, and all other profits to such market in anywise belonging and appertaining. The book states that the original words in this charter were, "*tolnetis et hujusmodi mercaturæ aliquatenus spectantibus.*" The charter had been recognized by an act of the 53rd of *George* the 3rd. The Jury found a verdict for the plaintiff on certain counts. The defendants moved for a nonsuit. The *first* ground was, that no tolls were given by the grant of *Charles* the 2nd, nor the amount of tolls specified in the grant. *Secondly*, that no evidence was adduced at the trial to shew that any certain toll had been received. It was sent to a new trial. It has sometimes been supposed that a new trial was awarded by the Court, upon the footing that the claim under the charter could not be supported, and therefore that it was sent again to be tried, that it might be seen whether a Jury would presume another charter sufficient to support the title to toll. The marginal note states it so. We think this is a mistake, and that no such inference is to be drawn, either from what the Court did, or from what the Judges said. Mr. Justice *Dallas*, in delivering the judgment of the Court upon that case said:—"The specific sums to be demanded for tolls are not expressed in the charter. The tolls therefore, which have been received subsequent to the grant, are merely presumptive, neither have they been uniform. The Jury should have given their verdict according to the invariable or uniform custom. The Judge could alone decide whether such tolls were or were not reasonable. In this case, there is no decision of this sort, and no certain toll has been uniformly paid within the memory of any of the witnesses who were examined. I therefore think, that, under the circumstances, there should be a new trial, and that the plaintiffs are entitled to recover only such tolls as have uniformly been collected; and as, on the second trial, it may be fully taken into consideration whether subsequently to

the original charter a new grant from the Crown may be presumed, I am of opinion that the rule should be made absolute, for setting aside this verdict on the Court granting a new trial. Mr. Justice *Park* concurred; and Mr. Justice *Burrough* said—"The uniformity in the payment of certain specific tolls has not been proved according to the facts contained in this case. No evidence has been adduced to prove the payment of any certain tolls, neither was there any evidence to shew when the payment of the first toll subsequent to the charter was made, nor the amount which was then demanded." The rule was made absolute for setting aside the verdict, and a new trial was granted. Now it will be observed, that there could be no consideration about whether the tolls were reasonable, if no tolls whatever were demandable for want of certainty expressed in the charter. Mr. Justice *Burrough* expressly put it upon the want of uniformity in the usage proved. It is not true, therefore, that the Court were of opinion that no toll could be taken under the charter. It would be much more true to say, that the Court sent the case to a new trial for want of evidence that a reasonable sum had been regularly paid. The opinion of the Court supposes, that, if that had been proved, the verdict would have stood.

The next case is *Prince v. Lewis*, reported in 5 *Barnewell* and *Cresswell*, page 363, in the year 1826. It is, to the present purpose, exactly like *Curwen v. Salkeld*, in the 3rd *East*. It was an action by the owner of *Covent Garden Market*, against an intruder, for erecting a stall within seventy or eighty yards of the market, in a neighbouring street, whereby the owner was disappointed of his toll. The grant of the market, as stated in the report, is to the same purport as that stated in the last case, and to the same effect as the language so often used; *the market with all liberties, free customs, tolls, stallage, piccage, and all other profits to the like market belonging*. There is no authority to take any specific sum. The right to take

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tolls by virtue of this grant is, as I have already mentioned, recognized by an act of the 53rd of *George the 3rd*, c. 71. The plaintiff failed in this action, because he occupied part of the market in a different way, without leaving sufficient room for the use of the public; and though he had recently corrected this, he had not given sufficient notice of it. The material observation to be made upon this case is, that the language of the charter is to the same effect as the present, and that, although there is no specification, no objection appears to have been taken to the grant upon any such ground. It seems to have occurred neither to the bar nor to the Bench.

I have now noticed every case which has been cited, and in the order of time in which they occurred. I have not referred to the passages cited from *Comyns' Digest*, because, even if they laid down a rule, they would be of little avail, unless supported by authorities; but, in truth, they do not give weight to either argument. They are quite equivocal as to the present controversy, and only say, that toll is not incident to a market, and that there must be a special grant of it. But it would not be just to infer that that great lawyer had a distinct view to the present controversy. What he has actually said, is consistent with both arguments. It seems most probable, that if the precise question had been put to him, he would have answered, that he considered the grant of toll even without a determinate amount, as a specific grant; for the case in *Palmer* is one of those which he cites as his authority.

Upon this review of the authorities, we are of opinion, that the corporation is entitled to retain their verdict. We think that where a grant of tolls is found in a charter, the word ought to have some meaning, and the charter some operation, and that it can receive operation only by being construed to mean a reasonable toll. We think that no one case has ever been determined against this con-

struction. We are convinced that the terms used in the present grant are nearly the same as are used in a great majority of those charters which have received the fiat of the Attorney-Generals for the time being, and passed the Great Seal; that tolls have, in numerous instances, been received under them; and, that if we were to decide against this charter upon the principles contended for, we should shake the security of a vast mass of property which has been enjoyed undisturbed for an age, perhaps for ages. We also think the observation, "that, to permit a grantee to take whatever may appear to him to be a reasonable toll, is to make a grantee a judge for himself, and to expose the subject to extortion," has received a satisfactory answer. The grantee demands it at his peril, and at the hazard of a private as well as of a public prosecution: of a private, at the suit of the party injured; of a public, at the suit of the Attorney-General, in the name of his Majesty. The inconvenience of raising such questions cannot be avoided by specifying the sum. The King cannot grant an unreasonable toll; and it is competent to every subject of the realm, from whom the toll is demanded, to question its being reasonable, even when the exact sum is specified in the charter. This question may always be brought under discussion, in whatever terms the grant may be expressed. For these reasons we think that the verdict must stand.

Postea to the plaintiffs.

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A. arrested *B.*, and died; the executors of *A.* again arrested *B.* for the same cause of action: —*Held*, that the second proceeding was not vexatious, and that the defendant was not entitled to be discharged out of custody on entering a common appearance.

THE defendant had been held to bail by the plaintiff's testator, in his life-time, for the same cause of action for which he was arrested in the present case. Upon which ground—

Hoggins, on a former day in this Term, had obtained a rule *nisi*, for discharging him out of custody, on entering a common appearance. Against which—

Alderson, now shewed cause.—The first action abated by the death of the testator of the present plaintiffs, and the second action is therefore not vexatious. The first action could not have been proceeded in by the plaintiffs, which is the criterion relied on by Lord *Mansfield* in *Barnes, Assignee of Saunders, v. Maton*, cited by Lord *Ellenborough* in *Kinnear v. Tarrant (a)*. Lord *Mansfield* lays down the following rule in that case: "The right ground is, that the second action is not vexatious, if the assignees could not proceed in the first action brought by the bankrupt." The principle applied in that case to assignees of a bankrupt, is equally applicable to the case of executors.

Hoggins, contra.—In the case relied on by the other side, it is mentioned, that *Bearcroft* cited the case of *Mayhoe v. Gregory*, which is in direct opposition to the principle contended for. If a party can be twice arrested, on account of the death of his creditor, it would follow, that he might be arrested a great number of times, if the executors should die from time to time.

GARROW, B.—It is impossible to say that the second

arrest is vexatious, where the first action has abated by the act of God.

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VAUGHAN, B.—The rule is, that *nemo bis vexari debet* for the same cause of action. The question, therefore, in this case is, was the second action vexatious? If not, the party is entitled to the same advantage of holding his debtor to bail as in the first action. The second action cannot be said to be vexatious, when it is brought because the first has abated by the death of the plaintiff. The case of the assignee is similar in principle, and it would require a strong authority the other way to satisfy my mind that such a proceeding was vexatious. The rule must therefore be discharged.

BOLLAND, B., concurred.

Rule discharged.

WEDLAKE v. HURLEY and Another.

ASSUMPSIT for money had and received. Plea—*Non assumpsit*. The plaintiff was the holder of a promissory note, made by one *Gould*, for 103*l.* 5*s.* 6*d.*, payable to the plaintiff at the house of the defendants. The defendants received from *Gould* a bill of the Bank of Ireland on the Bank of England, for 104*l.* 4*s.* 6*d.*, which was indorsed by *Gould*, as follows:—

“Pay to the order of *Hurley & Co.* (the defendants), under provision for my note in favour of *T. Wedlake*, (the plaintiff), payable at their office on the 1st *January*, 1830, for 103*l.* 5*s.* 6.”

This bill was remitted to the defendants in a letter con-

A. remitted to *B.* a bank-bill, indorsed, “Pay to the order of *B.*, under provision for my note in favour of *C.*, payable at the house of *B.*, on 1st *January*, 1830.” *B.* received the proceeds of the bill, and refused to pay them over to *C.* In an action for money had and received by *C.*:—*Held*, that *B.* was not liable to *C.*, because *B.* had never

assented to hold the bill or money to the use of *C.*

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taining instructions for the application of the proceeds of the bill, similar to the indorsement. The defendants kept the bank-bill till it was due, when they presented it, and received the money; and, upon the application of the plaintiff for the money after it had been received, they refused to pay it over, but kept it, claiming to set it off against a debt due to them from *Gould*. Upon these facts appearing at the trial, the Lord Chief Baron nonsuited the plaintiff, giving him leave to move to enter a verdict for the amount of the bank-bill.

On a former day, *Mawle* obtained a rule accordingly, citing *Cramlington v. Evans* (a), *Ancher v. The Bank of England* (b), *Sigourney v. Lloyd* (c), *De Bernales v. Fuller* (d), and *Kilsby v. Williams* (e).

Jones, Serjt., now shewed cause.—It is clear, that if a bill be remitted, with a special direction, it must be taken by the remittee subject to that direction; and, if he misappropriate the bill, he will be liable to the remitter: but the question here is, whether the person who is the object of the remittance, can maintain an action for money had and received against the remittee. The authorities are conclusive, that he cannot, unless there be an assent, or, to use a phrase borrowed from the law of real property, there be an attornment by the remittee. Until there be such an assent or attornment, there is no privity between the remittee and the person in whose favour the remittance is made. Several cases may be cited for the plaintiff, which it is unnecessary to discuss upon the present occasion. They are resolvable into two classes. The *first*, where a remittee is held liable to the remitter if he misapply the proceeds of

(a) 1 Show. 14.

(d) 14 East, 590, n.

(b) Dougl. 687.

(e) 1 D. & R. 476; 5 B. & A.

(c) 8 B. & C. 622; 3 Y. & J. 815.

bills remitted for a special purpose; and the *second*, where, by indorsement, the negotiability of a bill is tied up, so that no title to the bill can be derived under the indorsement, except by acting in conformity therewith. But the cases of *Williams v. Everett* (a), and *Yates v. Bell* (b), are conclusive upon the point in the present case.— Those cases clearly establish, that, until the remitter has assented, there is no privity between him and the party in whose favour the remittance is made. When the assent is given, the creditor looks no longer to the security of his original debtor, but relies on the assent of the remittee. If the bill had been lost, would the loss have fallen upon the party in whose favour the remittance was made? Besides, until such a transfer be made, the remitter has a right to countermand the authority of the remittee, who, for this purpose is *his* agent. He cannot be holding as agent for both parties at the same time, and therefore, until something arises in the shape of an attornment, the third party cannot maintain an action for money had and received: it is not his money, but he has his remedy against the remitter. In *Williams v. Everett* (c), Lord *Ellenborough* says, “ It will be observed, that there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter, but, on the contrary, an express refusal to the creditor so to do. If, in order to constitute a privity between the plaintiff and defendants as to the subject of this demand, an assent, express or implied, be necessary, the assent can, in this case, be only an implied one, and that, too, implied against the express dissent of the parties to be charged. By the act of receiving the bill, the defendants agreed to hold it till paid, and its contents, when paid, to the use of the remitter. It is entire to the remitter to give and countermand his

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(a) 14 East, 582.

(b) 3 B. & A. 643.

(c) 14 East, 597.

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own directions respecting the bill, as often as he pleases; and the persons to whom the bill is remitted, may still hold the bill till received, and its amount, when received, for the use of the remitter himself, until, by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they may have once given, but are bound to hold it for the use of the appointee." So, in *Yates v. Bell*, the present Lord Chief Justice of the Court of *King's Bench*, says, "where a party, to whom a bill is remitted, repudiates the trust with which the bill is clothed, that may give to the person remitting the bill the right to bring trover for it, but it does not give any right of action to the person to whose account the bill is directed to be applied; and unless some agreement had taken place respecting the bill between the defendants and the plaintiffs, the former could only be considered as holding the bill for the use of *Ingram*," (the remitter). *Stuart v. Fry* (a) is to the same effect. And these cases shew, that unless there be an assent by the remittee, the party in whose favour the remittance is made, cannot maintain an action against him for money had and received.

Blewitt, contra.—It may be conceded, that a party in the situation of these defendants cannot be made chargeable in such case, unless there be what will amount in point of law to an assent by him, or a privity between him and the plaintiff. The cases cited are distinguishable from this: *first*, because here the indorsement on the remitted bill was special and restrictive, whereas, in the cases cited, the indorsement was general; and *secondly*, because in those cases, and especially in *Williams v. Everett*, which

(a) 7 Taunt. 339.

is the leading authority in that class of cases, there was a distinct repudiation by the remittee of the mode in which he was directed to apply the proceeds. To constitute an assent or privity in point of law, it is not necessary that the parties should meet. If a party, by public advertisement, offer a reward, there is such a privity between him and any stranger performing the conditions, that an action of *assumpsit* may be maintained for the reward. So, where any person receives money wrongfully, and without the authority of the party entitled, there is such a privity in law, as that an action for money had and received will lie. This is laid down as to money received for fees of an office by a party not legally entitled, and the party really entitled to the office may bring an action for money had and received on such privity. So, a consignee, who has had no communication with a carrier, may sue him on the implied privity, arising, in point of law, from his being the legal owner of the goods. In the present case, the receipt of the money, on the terms of the indorsement, constitutes an assent to employ it on those terms. The authority under which the defendants received the money restricted the application of it. The defendants could not repudiate the terms of the indorsement; wherever they carried the bill, they shewed that they had received it on the restrictive terms of the special indorsement. *Sigourney v. Lloyd* shews that the indorsement in the present case operates as a restriction of the proceeds, when received, to the special purposes mentioned in the indorsement, and that such restriction extends to whomsoever the bill may come. The words of the indorsement in *Sigourney v. Lloyd* were, "Pay *S. Williams*, for my use:" *Williams* got the bill discounted, and misappropriated the proceeds. It was held by the Court of *King's Bench*, and afterwards in the *Exchequer Chamber*, in error, that the party who took the bill from *Williams* was liable. The act of receiving the money on such an indorsement is an acknowledgment by the party

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so receiving, that he receives it on the terms of the indorsement. If the assent were express, the plaintiff's right is clear; and the receipt of the money on the indorsement in question is, in point of law, an assent. By not repudiating the special direction of the remitter, an assent may also be implied. In *Williams v. Everett*, and *Yates v. Bell*, there was an express refusal; and the judgment of the Court of *King's Bench*, in both these cases, proceeded on the ground of the repudiation of the appropriation directed by the remitters.

ALEXANDER, L. C. B.—I retain the opinion which I expressed at the trial, and still think that the nonsuit in this case was right. The principle of the cases cited in favour of the defendants is clear. Those cases establish this rule: that the party in whose favour such a direction as the present is given, can maintain no action without something having been done by the remitter, which amounts to a privity or assent. It would be highly inexpedient to disturb so intelligible a landmark.

GARROW, B.—I am of the same opinion. There is no difference, in reason, between a direction expressed in a letter, and one written on the back of a bill.

VAUGHAN, B.—I am of the same opinion; and think, that the Lord Chief Baron was perfectly correct in directing a nonsuit in this case. The facts of the case are—that *Gould*, living in *Ireland*, has two creditors in *England*. He remits to one of them an *Irish* bill payable in *England*, with an express direction to apply the proceeds in discharge of a promissory note held by his other creditor. The bill arrives in *England*, and the proceeds are received by the remittee. On the misappropriation *Gould* might have maintained an action, but the present plaintiff cannot. It is impossible to distinguish this case from that of *Williams*

v. Everett. In that case, one *Kelly* made a remittance to bankers in *London*, with directions to pay, amongst others, the plaintiffs; and he sent a notification to the plaintiffs; that, if they called on the bankers, they would probably be paid. The plaintiff called, but the bankers refused to pay him. The bankers afterwards received the proceeds, and, according to the doctrine contended for by the present plaintiff, such receipt amounted to an assent. That, however, is a fallacy. Suppose the remittee were to become bankrupt, would that be a discharge as between the remitter and the creditor? To enable a party to recover in such a case, there must be an assent or agreement by the remittee to hold the bill or the proceeds for the plaintiff; and, for want of such a privity or assent, the present action must fail. The want of an express repudiation makes no difference, because the principle is, that there must be an assent.

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BOLLAND, B.—This case admits of no doubt, if the facts be the same as in the case of *Williams v. Everett*. Now, it seems to me, that the facts are in substance the same, and that the attempt to distinguish the two cases is ineffectual. There is no analogy between this case and that of the carrier, to which allusion has been made. The carrier's liability is to that party in whom the property in the goods is, and a privity exists between him and the consignor or consignee, according to their respective rights. In *Williams v. Everett* the letter was as strict an appropriation, as the indorsement on the bill is in the present case. The present is an endeavour to extend the privity further than the law allows. The rule must be discharged.

Rule discharged.

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PADDOCK v. JOHN FRADLEY and BUCKLEY.

A. by agreement promised to surrender into the hands of the lord, &c., "all those brickworks, copyhold of inheritance, then in the possession of *A.*, with full liberty, &c." to the use of *B.* and *C.*: no surrender was made, but *B.* and *C.* entered upon the premises. *B.* afterwards surrendered his interest to *C.*, and an action of trespass having been brought against *C.* and *D.*, they pleaded leave and licence from *A.* to *B.* and *C.*; *C.* justifying in his own right, and *D.* as the servant of *B.* and *C.*, and by their command; to which *A.* replied *de injuria*, &c. The question being, whether the *locus in quo* was comprised in the agreement, *B.* was called by the defendants to prove, by parol declarations of the plaintiff, that the *locus in quo* was so comprised. *B.*'s evidence was objected to, *first*, because he was bound to indemnify *D.* his servant, for an act done by his command in the assertion of a supposed right; and *2ndly*, because it was not competent to the defendants to extend by parol evidence the terms of the agreement to premises not in the possession of *A.* at the time:—*Held*, first, that *B.* was a competent witness; and secondly, that the terms of the agreement being ambiguous might be explained by parol testimony.

TRESPASS for breaking a close called *Big Brian's Wood*, and carrying away clay and marl. Pleas, *first*, not guilty; *secondly*, leave and licence; *thirdly*, leave and licence from the plaintiff to the defendant, *John Fradley*, and to one *Joseph Fradley*, to dig and get clay and marl out of the *locus in quo*, &c., and that *John Fradley*, in his own right, and *Buckley*, as the servant of *John Fradley* and *Joseph Fradley*, did the acts complained of under the last mentioned leave and licence. Replication to the two last pleas, *de injuriâ suâ propriâ*, without such leave and licence.

At the trial, before *Littledale J.*, at the last *Lent* assizes for the county of *Stafford*, the plaintiff having proved a *prima facie* case, the defendants gave in evidence an agreement dated the 10th *September*, 1827, made between the plaintiff of the one part, and *Joseph Fradley*, and *John Fradley*, therein described as brickmakers, of the other part; whereby the plaintiff, in consideration of the rents and agreements thereafter mentioned, promised and agreed, to and with the said *John Fradley* and *Joseph Fradley*, that he the said plaintiff should and would, at the then next general or some special court baron of the lord of the manor of *Newcastle-under-Lyme*, surrender into the hands of the lord of the said manor, by the rod, or otherwise, according to the custom thereof, *all those brickworks, being copyhold of inheritance within the said manor, situate at Shelton, then in the possession of the said plaintiff, and also full right, power, and authority to get marl and clay thereout, as well for making bricks, as for sale, together with &c.*, to the use of the said *John Fradley* and *Joseph Fradley*, for the term of fourteen years from the

25th day of *December* then next, yielding and paying a yearly rent, &c. No surrender appeared to have been made, but the defendants had carried on the brickworks for some time under this instrument. The question at the trial was, whether the agreement was intended to extend to the *locus in quo*, the plaintiff contending, and giving evidence to prove, that the agreement was confined to a close which he called *Little Brian's Wood*, where the old brickworks had been, and that it did not extend to the *locus in quo*, which he called *Big Brian's Wood*; the defendants contending, that the *locus in quo* was comprehended in the agreement.

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The defendants called *Joseph Fradley*, for the purpose of proving, amongst other things, declarations made by the plaintiff, when the agreement was entered into, defining the land which the *Fradleys* were to hold under the agreement, and which included the *locus in quo*. It was objected for the plaintiff, *first*, that *Joseph Fradley* was an interested witness, notwithstanding a release produced by the defendants of all his interest under the agreement, to his brother *John Fradley* the defendant; and *secondly*, that his evidence was inadmissible to vary the written agreement. The learned Judge received the evidence, and the Jury found a verdict for the defendants.

Campbell, on a former day, had obtained a rule for a new trial on the above points; against which cause was now shewn by—

Taunton, and *Peake*, Serjt.—The only question at the trial was, what were the premises comprehended in the agreement. The expression “all those brickworks,” was ambiguous, and therefore parol evidence was admissible, not to vary the terms of the written instrument, but to explain the ambiguity. A question of parcel or no parcel can only, in general, be determined by parol evidence. Where the expression is general and indeterminate, as in the pre-

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sent case, parol testimony is clearly admissible. As to the objection on the ground of interest, it is clear, that *Joseph Fradley's* interest was the other way, for he was called to prevent a co-trespasser from being fixed, and he was not liable to be sued for contribution, as there can be no contribution between *tort-feazors*. *Merryweather v. Nixan*(a). *Joseph Fradley* might have been a witness for the defendants, even without the release or conveyance of his interest, which was produced. The verdict in the present case could have no possible effect on his interest under the agreement, or in any action to be brought on the agreement against him. But, admitting that his interest under the agreement disqualified him, the release of his interest to his joint-tenant, who was capable, in point of law, of taking such a release, rendered him clearly a competent witness.

Talfourd, contra.—The description of the premises in the agreement is not merely "all those brickworks situate &c.," but it proceeds "*now in the possession of the plaintiff.*" Two questions arise, *first*, whether *Joseph Fradley* was a competent witness to give any evidence at all for these defendants; and *secondly*, whether, supposing him to be competent, the parol evidence given by him to vary the terms of the written agreement was admissible.

First, as to the objection to the competency of the witness *Joseph Fradley*. The release produced did not in the least touch the objection. The objection was, that *Buckley* justified as the servant of *Joseph Fradley*, and by his command, which was not traversed; and it must be taken upon this record, and as against these defendants, that *Buckley* had the command of *Joseph Fradley*, to do the acts complained of, as his servant. There was, therefore, upon his part, an implied contract to indemnify *Buckley* for what he did in pursuance of that order. The only release, therefore, which would have been effectual, was a release from

Buckley to *Joseph Fradley*, and the release from him to *Buckley* did not touch the objection. *Merryweather v. Nizan* was cited on the other side, to shew, that there is no contribution between co-trespassers. That is not disputed, but Lord *Kenyon's* judgment in that case makes out the argument for the present plaintiff. Lord *Kenyon* carefully guards against the doctrine there laid down, being extended to a case like the present; for he says "that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." Indeed, it would be highly inconvenient if a man's labourers were not to be indemnified for acts which they supposed lawful, and which were done by the master's order in the assertion of supposed rights. The rule, of there being no contribution between joint wrong doers, therefore, does not apply to this case, where the acts complained of were done in the assertion of the alleged rights of *Joseph Fradley*. He, therefore, was bound to indemnify *Buckley*, and incompetent to give evidence on *Buckley's* behalf, without a release from him.

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But *secondly*, evidence of conversations between *Joseph Fradley* and the plaintiff was not admissible to vary the terms of the written instrument. The agreement was not uncertain. It did not extend to all that *Paddock* had in the manor, but was restricted to what was then in his own possession. After evidence had been given to shew what was then in his possession, which did not include *Big Brian's Wood*, parol evidence to shew that more than was then in his possession was intended to pass, was clearly inadmissible. *Doe dem. Brown v. Brown (a)*.

GARROW, B.—This was an action of trespass *quare clausum fregit*, in which the plaintiff declared in the usual way. The defendants pleaded, *first*, the general issue;

(a) 11 East, 441.

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secondly, a general plea of leave and licence; and *thirdly*, a leave and licence from the plaintiff to *John* and *Joseph Fradley*, under which *John Fradley* justified in his own right, and *Buckley* as servant. The foundation of the pleas of leave and licence stands on the agreement proved to have been entered into between the plaintiff and the two *Fradleys*, by which the plaintiff agrees to surrender to their use, “*all those brickworks now in the possession of the plaintiff.*” On the trial, *Joseph Fradley*, one of the parties to this agreement, was called for the defendants. He was objected to; upon which the defendants produced a release of his interest to *John Fradley*, made at a time antecedent to the trial. It was objected, that he was interested, as *Buckley* justified by his command, and he might be liable over to *Buckley*. It appears to me that he was a competent witness for the purpose for which he was called. “All his brickworks,” is an ambiguous expression. What were “all his brickworks,” must be collected from something out of the four corners of the agreement. I am of opinion, therefore, that *Joseph Fradley*, having released his interest under the agreement, was a competent witness to prove what was intended to pass by “all the brickworks.”

VAUGHAN, B.—I am of the same opinion. The question is, whether, under the circumstances, *Joseph Fradley* was a competent witness to give any evidence for the defendants, and, if so, whether he could give the particular evidence in question. The *first* objection is founded upon the supposed interest of *Joseph Fradley*. The strongest argument on this point arises on the form of the plea; it is put for the plaintiff thus:—*Buckley* justifies as the servant of *John Fradley* and *Joseph Fradley*, and, as the command is not traversed, it must be taken that he did the act as their servant. It is then said, that *Joseph Fradley* could not be a witness for the defendants, because,

if a verdict passed against *Buckley*, inasmuch as *Buckley* justifies as servant of *Joseph Fradley*, the master must indemnify the servant; and that an undertaking to do so will be implied, in law, though none be expressly entered into. This proposition may be correct as applied to contracts, but it does not apply to actions of *tort*. This was distinctly laid down in *Merryweather v. Nixan*. The foundation of the plaintiff's argument therefore fails, because it is rested simply upon the position, that *Joseph Fradley* had an interest to prevent the verdict passing against *Buckley*, upon the ground that the law would imply an engagement, upon the part of *Joseph Fradley*, to indemnify *Buckley* against the consequences of an act done as his servant and by his command. If, then, he was a competent witness, was he competent to give the evidence in question? It is said, that he is not competent to vary the terms of a written agreement. The terms of the agreement are, "all those brickworks now in the possession," &c. It is said that there is no ambiguity in this agreement; that there is nothing to be explained; but that the premises must be confined to what was in the possession of the plaintiff at the time of the agreement; and therefore that no evidence was admissible to extend the premises beyond what was then in his possession. In *Goodtitle dem. Radford v. Southern (a)*, where a testator devised all his farm, called *Troque's Farm*, then in the occupation of *A. C.*, and it appeared that part only of that farm was in the occupation of *A. C.*, parol evidence was admitted to extend the devise to other lands of *Troque's Farm*, not in the occupation of *A. C.* This case, therefore, shews, that parol evidence is admissible to explain such an ambiguity as the present. In the present case, it being ambiguous of what the brickworks consisted, it was competent for the defendants to give parol evidence to explain

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(a) 1 M. & S. 299.

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what those were which were intended to be comprised; and as it appears that *Joseph Fradley* had no interest, and the form of the plea does not raise an undertaking on his part to indemnify *Buckley*, I am of opinion, that *Joseph Fradley* was a competent witness, and that his testimony was properly received.

BOLLAND, B.—There are two material points for our consideration in this case. *First*, whether *Joseph Fradley* was interested, and therefore incompetent to give evidence for the defendants; and *secondly*, whether his evidence was admissible to explain the written agreement. I have looked in vain for something to shew an engagement to indemnify *Buckley*, upon which the argument for the plaintiff has been founded. It would be very different if there had been any warranty or covenant on the part of *Joseph Fradley*; because, then it might fairly have been said, that he came to support the rights to which such covenant or warranty applied, and so, that there ought to have been a release from *Buckley*. It being therefore non-apparent that there was any such engagement to indemnify, and the form of the plea not appearing to me necessarily to imply an indemnity, I am of opinion, that *Joseph Fradley* was a competent witness, without a release from *Buckley*. With regard to the *second* question, namely, whether *Joseph Fradley* could be called to explain the written agreement, I am of the same opinion as the rest of the Court. In all matters of this description, we must look to the instrument, and to the words of it; if the words are clear, a witness cannot be called to explain the intent; but if they are ambiguous and indeterminate, the instrument may be explained by parol testimony. This instrument is of the latter description, and therefore, in my opinion, the evidence was admissible; and, having been given by a competent witness, the rule must be discharged.

Rule discharged.

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LADD v. ARNABOLDI.

THE defendant was arrested on a *quo minus* issued the 26th November, returnable the 28th (the last day of *Michaelmas* Term), and on the 4th December put in bail, which were duly excepted to. On the 23rd January (the first day of *Hilary* Term), the defendant obtained time to justify on the 27th, and on the 25th gave notice of adding and justifying bail for that day. On the 25th the sheriff was ruled to bring in the body (in six days); and the bail not having justified on the 27th, the plaintiff on that day took an assignment of the bail bond, and issued writs thereon against the defendant and his bail. On the 30th the bail justified.

By ruling the sheriff to bring in the body before the time for justifying bail has expired, the plaintiff does not enlarge the time for justifying bail until the expiration of the body rule, if, at the period when, independently of the body rule, the time for justification expires, he take an assignment of the bail bond; for, by so doing, he waives the body rule. *Bolland, B., dissentiente.*

In *Hilary* Term, *Archbold* obtained a rule to shew cause why the proceedings upon the bail bond should not be set aside for irregularity.

If the defendant do not justify his bail in due time, and *comperuit ad diem* is pleaded to a declaration on the bail bond, the Court will order the appearance of the defendant to be recorded as of the day on which the bail justified.

John Jervis shewed cause.—This rule may be put upon two grounds: *First*, that by ruling the sheriff the plaintiff has made his election, and cannot afterwards proceed against the bail; and, *secondly*, that the rule to bring in the body enlarges the time for the justification of the bail. An assignment of the bail bond may be taken after a rule to bring in the body, and even after an attachment has been lodged against the sheriff, if the attachment be waived. *Brown v. Neave* (a), *Pople v. Wyatt* (b). The bail are not prejudiced by proceedings against the sheriff, but it is otherwise if the assignment be first taken, because then the sheriff is deprived of his indemnity, and no subsequent proceeding can be taken against him.

(a) Wightw. 406.

(b) 15 East, 215.

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Now, if the plaintiff may waive an attachment against the sheriff and proceed against the bail, *a fortiori*, he may waive a rule to bring in the body, which is merely a preliminary step to expedite the proceedings, at a period of the cause when it is uncertain whether a default will be committed by the defendant. Upon this subject the case of *Poidevin v. Harvey* (a) is an express authority. There a rule *nisi* was granted to set aside the proceedings on a bail bond, on the ground that the assignment had been taken after service of a rule upon the sheriff to bring in the body; but the Court discharged the rule, on the grounds that the plaintiff might waive the proceedings against the sheriff, and take an assignment of the bond. That case, although it is not a decision of this Court, was acted upon and recognized in the case of *Brown v. Neave* in this Court; and although, in a late case, (*Whittle v. Oldacre*) (b), it was decided, that, in the Court of *King's Bench*, the rules upon the sheriff, and the time allowed the defendant for putting in and perfecting bail, are concurrent, and expire together, that case is no authority for the practice of this Court, which has been different; more particularly as in that case the plaintiff adopted the rule for bringing in the body by taking no steps at the period when, independently of that rule, the time for justification would have expired; whereas, in this case, the time for justification, independently of the rule, did not expire until the 27th, upon which day the assignment was taken.

Archbold, contra.—In the case of *Whittle v. Oldacre* all the authorities were reviewed, and, after deliberation, the Court of *King's Bench* decided, that when the sheriff is ruled to bring in the body, proceedings cannot be taken on the bail bond until that rule has expired. An assign-

(a) Wightw. 407.

(b) 7 B. & C. 478; 1 M. & R. 298.

ment before that time is therefore irregular, and it ought to be so, because, in practice, when the sheriff is ruled, he gives notice to the bail, and it would lead to great inconvenience if proceedings could be taken against them before that rule expires.

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Per Cur.—The proceedings are regular according to the practice of this Court. By not perfecting his bail in due time, the defendant is in default, and the right of the plaintiff to an assignment of the bail bond attaches, and is complete upon that default. The object of the rule is to bring the sheriff into contempt, and is a distinct and separate proceeding.

An affidavit of merits was afterwards produced, and the rule was made absolute, the bail bond standing as a security. The plaintiff did not, however, draw up and serve this rule, but pleaded to the declaration upon the bail bond, *comperuit ad diem*.

A rule was afterwards obtained, calling upon the defendant to shew cause why the appearance of the defendant should not be recorded as of the 30th *January*, on which day the bail justified, upon the authority of *Austen v. Fenton* (a), and *Allday v. George* (b).

Chilton shewed cause.—The Court will not make this rule absolute if the bail were justified in due time. Now, upon this point, there are distinct authorities, that if the plaintiff rules the sheriff to bring in the body, he thereby gives the defendant the same time for justifying his bail as the sheriff has for bringing in the body. In *Wright v. Walker* (c) it was expressly decided, that, if bail are put in and justified according to the rule upon the sheriff, the plaintiff cannot proceed upon the bail bond; and in *Black-*

(a) 1 Taunt. 23.

(b) 9 Price, 406.

(c) 3 B. & P. 564.

Exch. of Pleas, 1830. *ford v. Hawkins* (a) the same point was decided, although,

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by the report, the decision proceeded upon the ground that by ruling the sheriff the plaintiff had made his election, and could not afterwards proceed against the bail. In *Whittle v. Oldacre*, however, all the cases were reviewed, and the Court, having taken time to consider, examined the affidavits in each case. That case, therefore, which is expressly in point, is of great authority. *Brown v. Neave* and *Poidevin v. Harvey* are not, when examined, opposed to these authorities. In the first, the attachment had been set aside; and then, upon the authority of *Pople v. Wyatt* (b), it was regular to proceed against the bail; in the second, it is uncertain, from the note, whether the rule to bring in the body had expired. If it had expired, it was regular to proceed against the bail, because it might be waived; and, if it had not expired, that which was a decision of the Court of *King's Bench* has been overruled by the late case of *Whittle v. Oldacre*.

John Jervis, contra.—The practice of the *Common Pleas* proceeds upon the ground of an election, in which respect the practice of this Court is different (c); and this observation disposes of the cases decided in that Court. This difference in the practice of the different Courts is also a reason why, upon questions of practice, it is impossible to be bound by decisions in other Courts; and although it is desirable that the practice of the different Courts should be assimilated, until that is done, each Court must be bound by its own practice. Now, that the assignment of the bail bond was regular in this case has already been decided, and the case of *Poidevin v. Harvey* is an authority for that judgment; for although that was not a decision of this Court, it was acted upon and recognized, and thus

(a) 7 B. Moore, 600; 1 Bing.
181.

(b) 15 East, 215.

(c) 1 Tidd, 297; 1 Man. 121.

became the rule of practice of this Court. By the default of the defendant, the right of the plaintiff to the assignment is perfected; *Bond v. Evans* (a); and in this Court the rule upon the sheriff is not a step in the cause, but collateral merely, for the purpose of expediting the proceedings, and enabling the plaintiff, when the period arrives at which he must elect his course, to proceed against the sheriff. Before that period arrives, the rule may be waived within the time allowed for justification independently of the rule.

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The Court took time to consider; and there being a difference of opinion, the Judges delivered their judgments *seriatim*.

GARROW, B., after briefly stating the facts and dates of the case, expressed his opinion, that the assignment of the bail bond was regular, according to the practice of this Court; that the assignment having been taken on the 27th *January*, the plaintiff had waived the rule, and could not be said to have made his election to proceed with the rule so as to enlarge the time for putting in bail, and that, therefore, the rule ought to be made absolute.

VAUGHAN, B.—This was a rule calling upon the defendant to shew cause, why his appearance should not be recorded as of a particular day. It was an action upon a recognizance of bail, to which the defendant pleaded *compersuit ad diem*; and if the plaintiff be not entitled to make this rule absolute, he will be defeated in this action. It would seem, therefore, that the plaintiff is entitled to make this rule absolute *ex debito justitiæ*, and there are authorities which sanction the application, provided the facts of the case warrant the Court in exercising their dis-

(a) 7 D. & R. 374; 4 B. & C. 864.

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cretion to grant it. At one time it seems to have been doubted, whether this Court could entertain an application like the present (a); but, in the case of *Allday v. George* (b), this Court retraced their steps, and granted the amendment, being of opinion that the motion was founded in reason. In *Austen v. Fenton* (c), also, a similar amendment was made, and the Court said, "the entry of bail relates generally to the term, the effect of which must be, that the action, though properly commenced, will be defeated. There can be no reason why, for the purpose of obviating this consequence, the entry should not be made according to the truth of the fact." The authorities, therefore, favour the amendment; but it is resisted on another ground, and the occasion was taken to impugn the decision of this Court, upon the very point between the same parties, in a former stage of the cause, upon a rule to set aside the proceedings upon the bail bond, for irregularity. Perhaps we should have acted more consistently, had we refused to hear this question discussed a second time, because the object of this discussion was indirectly to impugn the judgment of this Court, and to re-argue a question which having been once decided between the same parties, ought, as between them at least, to have been at rest. The case, however, was re-argued, and I still retain my original opinion, upon grounds which I will now state. This question has been put upon different grounds in the different Courts. It has been said, that the plaintiff makes his election, by ruling the sheriff to bring in the body, and cannot afterwards proceed against the bail; and it has also been said, that the rule upon the sheriff enlarges the time for the justification of the bail, and that the defendant has the same time to justify his bail, as the sheriff has to bring in the body. By the practice of all the Courts, if the defendant does not justify his bail with-

(a) *Anon.* 3 Price, 36.

(b) 9 Price, 406.

(c) 1 Taunt. 23.

in due time after exception, he is guilty of a default, and the plaintiff may adopt either of two courses; he may take an assignment of the bail bond, or proceed against the sheriff by attachment. By ruling the sheriff to bring in the body, as a step preliminary to an attachment, it is said, in some of the cases, that the plaintiff makes his election, and cannot afterwards proceed against the bail. I cannot, however, assent to this doctrine, more especially when I find that, in the case of *Pople v. Wyatt* (a), it was decided, that after an attachment against the sheriff had been lodged, the plaintiff might abandon the attachment, and proceed against the bail; and when, in the case of *Brown v. Neave*, in this Court, it was held that, an attachment against the sheriff having been set aside, an assignment of the bail bond might be taken. It is true, that the plaintiff cannot proceed against the sheriff, after the bail-bond has been assigned, because then the sheriff has been deprived of his remedy against the bail, and has no means of indemnifying himself; but the converse of this is not true, for the plaintiff may waive the proceedings against the sheriff, and take an assignment of the bail bond. Upon the other question, namely, whether, by ruling the sheriff, the plaintiff enlarges the time for the justification of bail, it is to be lamented that the cases are not uniform, and that no distinct principle is to be collected from them, by which we may be guided in our decision. Undoubtedly, the cases of *Wright v. Walker*, and *Whittle v. Oldacre*, are authorities to shew, that the rule upon the sheriff to bring in the body, and the time for justifying the bail, are concurrent. In the former case, it does not appear at what period the time for justifying the bail expired, independently of the rule; and, in the latter case, the time for justification expired on the 10th of February, and, upon the 12th, the assignment was taken. In the latter case,

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(a) 15 East, 215.

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therefore, the plaintiff acted upon, and adopted the rule; but in this case, the time for the justification of the bail had not expired when the body rule was served, and the assignment having been taken on the 27th, nothing had been done upon the rule, so far as the defendant and the bail to the sheriff were concerned. This circumstance, in my opinion, differs this case from those to which I have alluded; but the case of *Poidevin v. Harvey*, which was adopted and recognized in this Court, is expressly in point. It was there held, that after service of a rule upon the sheriff to bring in the body, the plaintiff might waive the proceedings against the sheriff, and take an assignment of the bond. Now if, as in the cases of *Pople v. Wyatt*, and *Brown v. Neave*, an attachment against the sheriff may be waived, I can discover no reason why that which is an anterior step, for the mere purpose of expediting the proceedings, and putting the plaintiff into the condition of getting the attachment, may not be waived also; more particularly, for I wish to found myself upon that distinction, when nothing is done consequent upon that step, which in any way can affect the defendant or his bail; and when, independently of that rule, the right of the plaintiff to the assignment is perfect and complete. In my opinion, it is difficult to suggest any reason for depriving the plaintiff of this rule, because, if our former unanimous opinion was right, though this action, according to that opinion, is properly sustainable, he would be defeated by this plea, if this rule were not made absolute.

BOLLAND, B.—The question in this case is narrowed to a single point, namely, whether the body rule has the effect of enlarging the time for the justification of bail, until that rule has expired. Upon reviewing the authorities upon this subject, I cannot but think, that the rule laid down deliberately by the Court of *King's Bench*, in the case of *Whittle v. Oldacre*, is the sound rule. Whatever may

have been decided before, that case proceeds upon a revision of all the authorities, and distinctly lays down, that the rule upon the sheriff to bring in the body does enlarge the time for justification. Moreover, the uncertainty which would ensue from a contrary rule, would, in my opinion, be highly inconvenient; and therefore, looking at the different authorities, and the good sense of the thing, I am of opinion that the body rule does enlarge the time for justification, and that this rule should be discharged. But, as my brothers, who are more conversant with the practice of this Court, are of a contrary opinion, the rule will of course be made absolute.

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Rule absolute.

IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of King's Bench*).

EASTERBY v. SAMPSON and Another.

THE plaintiffs below, the defendants in error, declared in covenant, (after reciting that Sir *Charles Turner*, before and at the time of making the indenture of demise thereafter next mentioned, was seised in his demesne as of fee, of and in one undivided third part, the whole into three equal parts to be divided, of and in the tenements with the appurtenances, situate &c., thereafter next mentioned to have been demised, to wit, at

A lease of an undivided third part of certain mines, reciting, that, by permission of the lessor and the owners of the other two thirds, the lessee had pulled down an old smelting mill, and had agreed to build another of larger

dimensions, contained a covenant by the lessee to keep such new mill in repair, and so leave it at the expiration of the term, but contained no covenant by the lessee to build the new mill:—*Held*, that such a covenant by the lessee might be implied, and that the lessor might sue upon the implied covenant in respect of his interest.

A., by lease, containing a recital from which a covenant by the lessee to build a smelting mill was to be implied, demised all mines and minerals then open or discovered, or which might, during the term, be opened or discovered at or under certain moors and waste lands, and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for mines, *habendum* the demised premises with the appurtenances for nineteen years. *A.* assigned his reversion of and in the demised premises with the appurtenances to *B.*, who devised the same to *C.*:—*Held*, that the implied covenant to build a smelting mill ran with the land, because it tended to the use, benefit, and advantage of the thing demised, and that the assignee of the reversion might therefore sue upon it.

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&c. &c.), that the said Sir *Charles*, being so seised thereof, to wit, on &c., at &c., by a certain indenture of lease then and there made between the said Sir *Charles* of the one part; and *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, of the other part; whereby, after stating that the said Sir *Charles* did, in the month of *December*, 1799, agree with the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, to demise to them, for the term of twenty-one years, to commence from the 1st of *January* then next following, the undivided third part of the said Sir *Charles* of and in the mines, minerals, and quarries, thereafter described; at and under the yearly rent of &c., and under and subject to the covenants and agreements thereafter contained; and the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, did, in pursuance of the said agreements between them and the said Sir *Charles*, enter upon and take possession of the said third part and premises, on or about the said 1st of *January*, 1800, and had paid two years' rent for the same, &c.; and reciting that the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, had, since the said 1st of *January*, 1800, by and with the permission of the said Sir *Charles*, and of *W. S., Esq.*, and *C. F. F., Esq.*, the owners of the other two third parts of the said mines and premises, taken down a smelting mill belonging to them, situate upon part of a tract of waste ground within the manor, &c., and some other contiguous buildings; and the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, did engage to erect, at their own expense, a smelting mill of larger dimensions, with several adjoining buildings, upon another part of the said tract of waste ground, which mill, with the water-wheel belonging thereto, and the said other buildings, it had been agreed should belong to and be the property of the said Sir *Charles*, *W. S.*, and *C. F. F.*, in lieu of the said mill and buildings so taken down; the said indenture witnessed, that in consideration of the rent thereby reserved, and of the covenants and agreements thereinaf-

ter contained on the part of the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, the said Sir *Charles* did demise, grant, and to farm let unto the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns, all that the said undivided third part or share of the said Sir *Charles*, of and in all and singular the mines, veins, pipes, floats, strings and parcels of lead, tin, and copper ore, and other minerals and fossils of what nature or kind soever, which were then open, known, found, discovered, or which could, should, or might, during the continuance of that demise, be opened, known, found, discovered, or gotten, in, within, upon, from, or under all the moors, commons, wastes, and inclosed lands, situate, lying, and being in or within, or parcel of the several manors or lordships, or reputed manors or lordships, &c.; and also, of and in all mines and seams of coal, and quarries of stone, then found, discovered, or opened, or which, during the continuance of that demise, could, should, or might be found, discovered, or opened in or within the said manors or lordships, or reputed manors or lordships, &c.; and also of and in all smelting mills, stamping mills, refining mills, store-houses, work-houses, smith's forges, bingsteads, sheds, hovels, and buildings, situate, standing, or being in or upon any part of the said moors, commons, or wastes, which then were, or at any time thereafter had been, commonly used or employed for mining purposes, together with full and free liberty, power, and authority to and for the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns, and their and every of their agents, miners, workmen, and servants, from time to time, and at all times during the continuance of that demise, to dig, sink, drive, work, and make grooves, shafts, pits, drifts, pumps, way-gates, adits, and levels, and to use all other lawful ways and means whatsoever, (hushing in any lands or grounds lying within the said manors, or any of them,

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and which on the day of the date of the said indenture were inclosed, only excepted, unless the same should be done with the licence and consent in writing of the lords of the said manors for the time being, to be signified as thereinafter was mentioned), during the continuance of that demise, for the searching for, finding, discovering, winning, working, and getting of the lead, tin, and copper ore, and coal, and all other minerals and fossils of what nature or kind soever, and for working the said quarries, and burning lime in or upon all or any of the moors, commons, wastes, and inclosed lands, situate, lying, or being in or within, or parcel of, the manors or lordships, or reputed manors or lordships, of &c.; and one third part or share of the said lead, tin, and copper ore, and coal, and all other minerals and fossils of what nature or kind soever, which should be so found, raised, or gotten, to have, lead, and carry away, and take and convert to and for the proper use and benefit of the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns; but so as that in and by the use or exercise of the powers or authorities thereby given, the scite or foundation of any house, mill, or other building, should not be injured, nor the soil in any yard, court, garden, plantation, or orchard, adjoining or contiguous to any house or building, be opened or broken; and also with full and free liberty, power, and authority, (but so far only as the said Sir *Charles* could or might lawfully grant the same, and not otherwise), to and for the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns, and their, and every of their agents, miners, workmen, and servants, from time to time, and at all times during the continuance of that demise, to have ground-room, heap-room, and pit-room, in and upon the said moors, commons, wastes, and inclosed lands, as well for the laying and placing, washing, dressing, and storing of the ores, minerals, and fossils, coal, and

stones, which should from time to time be so wrought, won, or dug forth or out of the mines and quarries of which one third part was thereinbefore demised, and arise from waste hillocks situate upon the said manors or lordships, as also of such stones, earth, gravel, metal, and rubbish, as should proceed, or be had, gotten, or come forth or out of the same mines and quarries in the winning and working thereof, and for any of those purposes to make, lay, and use waggon-ways, and other ways, in, through, over, along, and upon the said moors, commons, wastes, and inclosed lands; and also for way-leave, and passage, and ingress, egress, and regress, in, upon, over, and along the said moors, commons, wastes, and inclosed lands, as well on foot and on horseback, as with carts, carriages, and horses, to and from the said mines and quarries; and likewise with full and free liberty, power, and authority, (but so far only as the said Sir *Charles* could or might lawfully grant the same, and not otherwise), to and for the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns, and their agents, miners, servants, and workmen, from time to time, and at all times during the continuance of that demise, to divert or turn any watercourse or watercourses, and to dig and make any watercourses, drains, adits, levels, trenches, dams, or sluices, in, upon, or through any part of the said moors, commons, wastes, and inclosed lands within the said manors or lordships, &c., for working any machinery or engines for the purpose of mining, or for washing, cleansing, dressing, smelting, refining, and manufacturing the lead, tin, and copper ore, and minerals, and fossils, which should or might be raised or gotten as aforesaid, and be produced from such waste hillocks as aforesaid; and with full and free liberty, power, and authority, (but so far only as the said Sir *Charles* could or might lawfully grant the same, and not otherwise), to and for the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*,

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their executors, administrators, and assigns, to do, perform, and execute all such other works, matters, and things, (hushing as aforesaid only excepted), as should or might be necessary for winning and working the said mines and quarries, and dressing and smelting the ore and minerals obtained therefrom, and from the waste hillocks upon the said manors or lordships; and also full and free liberty, power, and authority to and for the said *A. S., J. S., G. D.,* the said defendant, *W. H.,* and *F. H.,* their executors, administrators, and assigns, during the continuance of that demise, to erect or build in or upon any part of the said moors, commons, wastes, and lands then uninclosed, all such smelting mills, stamping mills, rolling mills, crushing mills, refining mills, roasting houses, smith's forges, and furnaces, chimnies, engines, store-houses, hovels, lodges, sheds, bingsteads, and other buildings and erections, as should or might be requisite or necessary for the better and more effectually winning and working of the said mines and quarries, and for washing, dressing, smelting, refining, and manufacturing the lead, tin, and copper ore, fossils, stones, and minerals, which should be raised or gotten in, within, upon, from, or out of the said moors, commons, wastes, and inclosed lands, and waste hillocks, or any of them, or any part thereof; and also to dig, take, and carry away peat and turf off and from the said moors and commons, for the purpose of roasting, smelting, or refining the ore raised out of the said mines, or for working steam engines or other engines, and for the use of the miners, agents, and workmen employed in working the same, both at their dwelling houses, and at the level heaps or shaft heaps; and also to take and get ling from the said moors or commons for the like purposes; and also for the purpose of thatching and covering any of the buildings belonging to the said mines, and the houses inhabited by the miners, servants, agents, and workmen employed and to be employed in and about the said mines and work-houses,

or any of them, and to do and perform all such other matters and things whatsoever, (hushing as aforesaid only excepted), that might be requisite or necessary for winning and working the said mines and quarries, and for washing, dressing, and cleansing, roasting, smelting, refining, and manufacturing the lead, tin, and copper ore, fossils, and minerals, which should or might be gotten or raised within, upon, or out of the said moors, commons, wastes, and inclosed lands, &c. *Habendum* the said undivided third part or share of the said mines, minerals, and quarries, and all other the premises thereinbefore mentioned and intended to be thereby demised; and all and singular the powers, privileges, and authorities, &c., to the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns, for the term of nineteen years thenceforth next ensuing and fully to be complete and ended, at and under a certain rent, &c. And the said defendant did in and by the said indenture of lease, for himself, and his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said Sir *Charles*, his heirs and assigns, (amongst other things, in manner following, that is to say), that the said *A. S., J. S., G. D.*, the said defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns, should and would, during the continuance of the said demise, maintain, preserve, and keep the said smelting mill engaged to be erected and built by them, with the water-wheel to the same belonging, and the lobbies, ore-houses and other houses, bingsteads, sheds, and other buildings already erected, and which, during the continuance of that demise, should be erected contiguous or near to the said mill, and all water-courses, drains, and sluices, which should lead to or have any communication therewith, in good and sufficient condition and repair; and should and would at the expiration or other sooner determination of the said term, yield and deliver up the same in good and sufficient condition

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and repair; and should and would also, at the expiration or other sooner determination of the said term, quit and deliver up in good and sufficient order and repair, all such smith's forges, work-houses, store-houses, wood-houses, sheds, hovels, and other buildings, as should, within two years next preceding the expiration or other sooner determination of the said demise, be used, occupied, or employed by the said *A. S.*, *J. S.*, *G. D.*, the said defendant, *W. H.*, and *F. H.*, their executors, administrators, or assigns, or their agents, or workmen, for mining purposes.

The declaration then stated an assignment by Sir *Charles* of his reversion to *G. B.*, and the will and death of *G. B.*, by which that reversion vested in the plaintiffs below.

The declaration then assigned three breaches:—*First*, that the said defendant did not nor would, nor did nor would the said *A. S.*, *J. S.*, *G. D.*, *W. H.*, and *F. H.*, or any of them, during the continuance of the said demise by the said first mentioned indenture granted, and after the said plaintiffs became so seised of the said reversion of and in the said demised premises as aforesaid, and after the death of the said *G. B.*, (to wit), &c., and from thence until the determination of the said term by the said first-mentioned indenture granted, or at any time during the said demise, erect or build, &c., a smelting mill of larger dimensions than the said smelting mill so taken down as in the said first-mentioned indenture in that behalf mentioned, with a water-wheel and adjoining buildings, upon another part of the said tract of waste ground in the said first-mentioned indenture mentioned, but wholly neglected and refused so to do. *Secondly*, that the said defendant, and the said *A. S.*, *J. S.*, *G. D.*, *W. H.*, and *F. H.*, did not maintain, preserve, and keep the said smelting mill, &c., in good and sufficient condition and repair, &c. *Thirdly*, that the said defendant, and the said *A. S.*, *J. S.*, *G. D.*, *W. H.*, and *F. H.*, did not, at the expiration of the said term, yield or deliver up the said smelting mill en-

gaged to be erected and built, &c., in good and sufficient condition and repair, &c. Esch. Chamber,
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The defendant below demurred generally, to the first breach separately, and jointly to the second and third breaches. The plaintiffs below joined in demurrer.

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The Court of *King's Bench* gave judgment for the plaintiff below, deciding, *first*, that the deed contained an implied covenant with Sir *Charles Turner*, to erect, &c. a smelting mill, &c.; and *secondly*, that such covenant ran with the land so as to entitle the assignees of the reversion to sue for a breach thereof (*a*). Upon this judgment, the defendant below brought a writ of error, which was now argued by—

Broderick, for the plaintiff in error.—In the consideration of this question, it is material to look to the terms of the demise, and the nature of the interest which the lessor had in the wastes in question. From the record it does not appear that Sir *Charles Turner* had any interest in the wastes, beyond a mere easement; and it must also be remembered that the agreement recited in the deed was made with Sir *Charles Turner* and two other persons, and not with Sir *Charles Turner* alone. Two questions arise upon this record: the *first*, whether there is any covenant express or implied to erect the smelting mill; and the *second*, whether, if there is such a covenant, it will pass to the assignee of the reversion, so as to entitle him to maintain an action for the breach thereof. It is apparent, that at the time of the demise there was no smelting mill in existence. The former smelting mill had been taken down under the agreement with Sir *Charles Turner* and the two other persons, and the new smelting mill was to belong, when erected, to them. It is clear, from the pleadings, that there was no express demise of, or covenant as

(a) 9 B. & C. 505.

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to the smelting mill which was not then in existence. But the question is, whether the Court can imply such a covenant. It is not denied that the intention of the parties may be collected from the terms of the deed, so as to imply a covenant which is not expressed; but the question here is, whether a covenant with Sir *Charles Turner* alone can be implied. That such an inference may be drawn from a variety of facts, it is not necessary on this occasion to controvert. There are very many authorities upon that subject, but, upon examination, these authorities will be found inapplicable to the present case. In order to shew that there might be a covenant without express words, *Saltoun v. Houstoun* (a) was cited in the Court below; but the circumstances distinguish this case from that, because, here there was an actual agreement with Sir *Charles Turner* and two others to rebuild these mills, and where there is an existing contract with three persons apparent on the face of the lease, how can the Court imply a different contract with one of those persons only? The maxim "*expressum facit cessare tacitum*," is strongly applicable to this case. The contract recited contravenes the covenant sought to be implied, by shewing what the real contract was; and that circumstance distinguishes this case from the various authorities which may be cited. If it be said, that the agreement may be taken as a separate contract with Sir *Charles Turner*, how does that appear? Could he maintain a separate action upon it? Certainly he could not. And if it could be inferred that a separate action was maintainable by him, it would follow, that the two others might also maintain separate actions. If the lessee is liable to the three parties jointly, who were entitled to the old smelting mill, and would be entitled to the new one when erected, he cannot be answerable to Sir *Charles Turner* separately, upon an implied contract, and therefore

(a) 1 Bing. 433.

will not be liable to his assignee. The second question is, whether, supposing there is an implied covenant with Sir *Charles Turner*, it run with the land, so as to enable the assignee of the reversion to sue the lessee. In the present case, the covenant will not run with the land, according to the rule laid down in *Spencer's case* (a). The first resolution in that case deals with the subject where the thing purporting to be demised is not in existence, and the covenant cannot, according to that resolution, be appurtenant to a thing which has no existence, as argued for the plaintiffs below. It is said in that resolution, "but when the covenant extends to a thing which is not in being at the time of the demise being made, it cannot be appurtenant or annexed to the thing which hath no being;" and, at the end of that resolution, it is stated, "but in the case at bar, the covenant concerns a thing which was not in existence at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors, and administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being." In the present case, the smelting mill, to which the covenants relate, was not in existence at the time of the demise; and neither the mill, nor the waste where it was to be built, was parcel of the thing demised. The second resolution contains the well-known rule as to what covenants run with the land. That resolution states "if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that, forasmuch as it is to be done upon the land demised, it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So, on the other hand, if a warranty

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be made to one, his heirs and assigns, by express words; the assignee shall take benefit of it, and shall have a *warrantia chartæ*. But, although the covenant be for him and his assigns, yet, if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As, if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessee, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore, in such case, the assignee of the thing demised cannot be charged with it, no more than any other stranger." Now, the facts in the present case can only shew an implied covenant to build upon the waste which is not demised. It does not appear on the record that the waste belonged to Sir *Charles Turner*. He may have had some right to make erections, but he had no right in the soil of the waste. As nothing but the *demised premises* passed to the assignees of the reversion, neither the smelting mill nor the waste passed to them. The covenant sought to be implied in the present case is neither more nor less than a covenant to build on the land of a stranger, and does not, therefore, run with the land, so as to pass to the assignee of the reversion. It was, however, argued in the Court below, and the judgment seems to have proceeded on that argument, that the smelting mill in question was not merely collateral, but was something tending to the maintenance and support of the mines. Lord *Tenterden*, C. J., in delivering the opinion of the Court below, says (a), "the building that the lessees covenanted to erect and maintain was of this kind: it was to be built for mining purposes; it was to be used for those purposes;

(a) 9 B. & C. 515.

it was to be the property of the owners of the mines; it related to the mines, and to the mines only; it could not be the property of the owners of the mines, except in that character; if severed from its connexion, it would not belong to the owners. Can it then be said, that these covenants concern a matter collateral to and unconnected with the tenements demised?" If the nature of a smelting mill be considered, it will be found to have no direct connexion with the support or maintenance of the mines. A corn mill might as well be said to tend to the support of the land where the corn grows. The use of the smelting mill is to purify the ore, and prepare it for sale, and it is neither necessary nor usual to have the smelting mill near the mines. It might be different if the covenant related to a work like a shaft, or a steam engine, which might be necessary for the working of the mines; but it is a fallacy to assume that the smelting mill in question is necessary for the working the mines; nor can it be said to tend to the support of the mines without an extravagant use of words. The covenant therefore was merely collateral, and did not run with the land, so as to enable the assignee of the reversion to maintain the present action.

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Alderson, contra, was stopped by the Court.

ALEXANDER, L. C. B., delivered the judgment of the Court:—

Two points have been made for the plaintiff in error. The *first*, whether there is any covenant at all on the part of the lessee, with Sir Charles Turner, to build the smelting mill in question; and the *second*, whether, if there be such a covenant, it runs with the land so as to give the assignee the benefit of it.

We are of opinion, in the first place, that there is such a covenant. In *Com. Dig. Covenant*, (A.) 2, it is laid down, that, "any words in a deed which shew an agreement to

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do a thing, makes a covenant." It cannot be doubted that a covenant may be created by any words in a deed which shew the intention of the parties to create an agreement, though such words be merely contained in the recitals of the deed. We are of opinion, therefore, that a covenant to build the smelting mill does arise on the part of this lessee. There is an engagement recited to build the smelting mill on part of the waste, which is to belong to Sir *Charles Turner* and two others; and then the deed proceeds to state a demise from Sir *Charles Turner*. The lessees covenant to maintain in repair the mill to be erected, and to deliver it up at the end of the term. It has been ingeniously argued, that the agreement recited, being with Sir *Charles Turner* and two others, the covenant to be implied must also be with the three; but we think that a separate covenant with Sir *Charles Turner* arises on this deed. In the *second* place, we think that the assignees of Sir *Charles Turner* are entitled to sue for a breach of this covenant. *Spencer's* case, and the judgment of Lord *Ellenborough*, C. J., in *The Mayor of Congleton v. Pattison* (a), shew that any covenant connected with the thing demised, so as to tend to the use, benefit, or advantage of the thing demised, runs with the land, so that the assignee of the reversion shall have advantage of it. Lord *Ellenborough*, in the case last referred to, says, "that the covenant in that case would bind the assignee, if it affected the nature, value, or quality of the thing demised, or if it affected the mode of enjoying it." If it were necessary for the decision of this question, we might perhaps think, that the various provisions of this deed, (*which the learned Chief Baron here went through with great minuteness*), almost amounted to a demise of the moors or wastes whereon this mill was to be built. It is not, however, necessary for us to go that length, as we think it clearly connected

(a) 10 East, 135.

with the enjoyment of the mines. It may be true, that it is not absolutely necessary for the enjoyment of the mines, but it is equally true, that it affects the mode of enjoying them. It cannot be doubted, that by the provisions of this deed, the new mill was to be immediately connected with the use of these mines. We are therefore of opinion, that there is, in the present case, an immediate connexion with the thing demised, according to the doctrine stated by Lord *Ellenborough* in the case of *The Mayor of Congleton v. Pattison*; and that the covenant runs with the land, so that the assignee of the reversion may have the benefit of it. The judgment of the Court of *King's Bench* must, therefore, be affirmed.

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Judgment affirmed.

END OF TRINITY TERM.

MEMORANDUM.

HIS Majesty King *George 4th*, died on Saturday, 26th *June*. On that day one Judge sat in each Court for the purpose of taking bail only, and on the *Monday* following the Judges and King's Counsel took the oaths of allegiance, &c., to his present Majesty. By the demise of the Crown the patents of precedence expired, and accordingly *John Fonblanque* and *Thomas Jervis*, Esqrs., Sir *Charles Wetherell*, Knt., and *Henry Brougham* and *Thomas Denman*, Esqrs., took their seats without the bar.

IN the following vacation, *Thomas Jervis*, Esq., Sir *Charles Wetherell*, Knt., and *Henry Brougham*, Esq., were appointed his Majesty's counsel learned in the law, with their former rank. And fresh patents of precedence were granted to *John Fonblanque* and *Thomas Denman*, Esqrs.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

MICHAELMAS TERM, 1 WILL. IV.

The ATTORNEY GENERAL *v.* HAWKES.

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INFORMATION for penalties. The first count stated, that a certain officer of the customs, to wit, one *Thomas Dabbs*, upon the examination by him, the said *Thomas Dabbs*, as such officer, of a certain case containing goods and merchandizes, which had been then and there imported from parts beyond the seas, to wit, *Hamburg*, and which had been entered, &c. as containing toys, then and there discovered and found certain goods other than toys, to wit, one hundred pounds weight of bugles, in the said case, which last-mentioned goods had been then and there landed without due entry thereof, contrary to the statute, whereby the said goods became forfeited and liable to be

Information for offering a bribe to *Thomas Dabbs*, a custom-house officer. Evidence that his name of baptism was *Thomas Tyrrel Dabbs*, in which name his commission was made out, but that he was as well, or better, known at the custom-house and in the trade by the name of *Thomas Dabbs*, which name he himself general-

ly used:—*Held*, no variance.

Where an information charged an importation of bugles, and it was doubtful whether the articles imported were beads or bugles, upon which different duties were payable, but they were treated at the custom-house and in the trade as bugles, and the defendant himself had treated them as such:—*Held*, no variance.

Where goods are ande fraudulently under a bill of sight it is no protection against penalties.

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seized, &c.; yet the defendant did offer to give to him, the said *Thomas Dabbs*, so being such officer, and by whom the said goods other than toys had been discovered, a certain bribe, recompense, and reward, to wit, the sum of 10*l.*, if he, the said *Thomas Dabbs*, would take no notice of the said bugles, but pass the same, contrary to his duty in that behalf; the said offer being then and there made by the said defendant to induce the said *Thomas Dabbs* to neglect his duty as such officer; whereby, &c. The fifth and sixth counts charged that the defendant assisted, and was otherwise concerned, in the unshipping of other goods liable to the payment of duties, to wit, bugles and glass, the duties thereon not having been paid or secured.

At the trial, before *Alexander, C. B.*, at the Sittings after last *Hilary* Term, a verdict was found for the Crown on the first, fifth, and sixth counts.

A rule was obtained by *Jervis* to enter a verdict for the defendant, or to enter the verdict for the Crown upon the fifth count only, or for a new trial, upon the several points which are fully stated in the judgment of the Court.

The case was argued in *Trinity* Term last by *Clarke*, and *Walton*, for the Crown; and by *Jervis* and *John Jervis*, for the defendant.

Cur. adv. vult.

ALEXANDER, L. C. B.—This was a rule to shew cause why the verdict should not be set aside, or entered for the Crown on the fifth count only, or why a new trial should not be had. The verdict was against the defendant on the first, fifth, and sixth counts. The first count was for offering a bribe to one *Thomas Dabbs*, a custom-house officer. The fifth count was for being concerned in unshipping certain goods liable to the payment of duties, the duties being

unpaid. The goods are described as a certain weight of bugles, and also a certain weight of glass. The sixth count was for the same offence, the goods being described as a certain weight of glass.

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The first objection was to the proof of the reports made by the masters of the two vessels. The information regards two different importations, one by a vessel called the *Elbe* packet, another by the *Regent*. It was necessary to prove the reports made by the masters. They are signed and sworn to by the masters. The officers of the customs stated the course of the office in receiving the master's report. The master tenders it when he is sworn to it. The officers look at the ship's register, and if it appear that the name is the same in the two documents, they ask him if he is the person described, and if he says he is, they then swear him. It was objected, that the masters' signatures to the reports and affidavits should have been proved. As the reports were produced by the proper officer who had received them, according to the ordinary course of business, I thought this was sufficient to prove the fact of the reports: I think so still. But, however this may be, the subsequent proceedings, and the entries made by the defendant, in which the reports actually made are acknowledged and entered, confirm this, if it were necessary; and, therefore, I lay that objection out of the question.

I come now to the more important objections. They relate to the first count for offering a bribe. The count is to this effect:—It states that a certain officer of the customs, to wit, one *Thomas Dabbs*, upon an examination by him, the said *Thomas Dabbs*, as such officer, of a certain case, which had been entered in the name of *Horne & Company*, as containing toys, he, *Thomas Dabbs*, discovered and found certain goods other than toys, to wit, one hundred pounds weight of bugles, in the said case, which last-mentioned goods had been then and there landed without due entry, whereby and by force of the statutes the goods were forfeited and liable to be seized; yet *Henry*

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Hawkes, the defendant, well knowing the premises, did offer to give to him, the said *Thomas Dabbs*, a certain bribe, to wit, the sum of 10*l.*, if he, *Dabbs*, so being such officer as aforesaid, would take no notice of the said bugles, but pass the same, contrary to his duty; and that this offer was made to induce *Dabbs* to neglect the duty of him, the said *Thomas Dabbs*.

The first objection arose out of the statement of the name given to the officer. He is called, in the information, *Thomas Dabbs*, but it appears that his name is *Thomas Tyrrel Dabbs*. As soon as this appeared, it was contended, that the information must fail, because the bribe was stated to have been offered to *Thomas Dabbs*, whereas, if offered at all, it had been offered to *Thomas Tyrrel Dabbs*. I overruled the objection, having, at that time, no confident opinion upon the point, and saved it to the counsel for the defendant.

It is manifest, that if a bribe were offered to a custom-house officer to neglect his duty, it was indifferent whether his name was *Thomas Dabbs* or *Thomas Tyrrel Dabbs*. Yet, upon this subject, considerable strictness has prevailed. The object of this strictness is to guard against the accused being misled as to the charge against him—that he may know of what offence he is accused, and may come prepared to defend himself if he can. The object of this rule explains and construes it. If, therefore, it is the name by which the party meant to be pointed out is known, that is sufficient, though it may not be his name of baptism. There is then no danger of the defendant being misled, or of his mistaking the charge against which he has to defend himself.

What *Dabbs* said upon his examination was this:—
“ My name is *Thomas Tyrrel Dabbs*, I generally sign my name *Thomas Dabbs*.” “ Do you generally go by the name of *Thomas Dabbs*?” “ Yes, I am only known by that name at the custom-house, my commission is *Thomas Tyrrel*

Dabbs. "Do you say that you are known by that name only?" "No, not by that name only." "Are you known by the name of *Thomas Tyrrel Dabbs*?" "Not generally; *Thomas Dabbs* I generally pass by at the custom-house." "How do you sign your name? *Thomas*—without *Tyrrel*?" "Yes." Can any man believe, upon this statement, that it is possible the defendant, who knows the officer at the custom-house only, can have been misled as to the person respecting whom he was charged.

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Though it would be quite ridiculous to suppose that in this particular instance the defendant has suffered by this misnomer, yet, if it be established as a rule, that such misnomer shall be fatal to any criminal or penal proceeding, it would be fit, in my opinion, to follow that rule. It is so, unquestionably, where the person is not known by the name stated in the pleadings, where it is a mere mistake, but not as here, when he is better known by the name stated in the pleadings than by the actual name of baptism.

The case, which has been cited for the purpose, clearly shews the exception. It was the case of the Baroness *Turkheim* (a). The prisoner was indicted for larceny in stealing the goods of *Victory Baroness Turkheim*. This lady stated her name to be *Selina Victoire*, that Baroness *Turkheim* was her title—a foreign title—and that she was constantly called and known by the name stated in the indictment. This indictment was sustained. The book says the Court held, "that all the law requires is certainty to a common intent, and that she could not possibly be mistaken for any other person." So, I say, that this man, called *Thomas Dabbs*, the officer of the customs, in the information, who always signs his name in that way, and is known as *Thomas Dabbs*, cannot possibly be mistaken for any other person; and, therefore, I am of opinion, that the omission of

(a) *Sull's case*, 2 Leach, 1005.

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the other Christian name is no objection to the verdict on the first count (a).

It has been stated, that one reason for requiring precision is, that, in the event of an acquittal, the defendant may be able to avail himself of that acquittal by pleading *autrefois acquit*, which, in this case, he could not do, because a new information might charge him with an attempt to bribe *Thomas Tyrrel Dabbs*, and to such an information he could not plead the acquittal on a charge of attempting to bribe *Thomas Dabbs*. To this I answer, that he might defend himself in that way with the aid of an averment, which it would be competent to him to introduce, that *Thomas Dabbs* and *Thomas Tyrrel Dabbs* were the same person (b). I am of opinion, then, that this is no material variance.

It was suggested, in the course of the argument, that this ought to have been put to the Jury; and that, in consequence of that not having been done, there ought to be a new trial. If any thing ought, upon this subject, to have been put separately to the Jury, with a request that they would consider and decide upon it, there was undoubtedly a failure in the trial. In truth, nothing was said to them by me upon this point. As the defendant has now suggested it, it is fit to be considered.

My reflections have not been able to suggest to me what point I could have put to the Jury with any utility. Was I to ask them whether this man's proper name was *Thomas Dabbs* or *Thomas Tyrrel Dabbs*? But I think that, in the present case, immaterial. Was I to ask them whether the witness was generally known at the custom-house as *Thomas Dabbs*, and always signed his name so? But he said so, and there is not the slightest evidence to bring it into doubt. As a fact, it was never

(a) See *R. v. Norton*, R. & R. 510; *R. v. Clark*, Id. 358.

(b) See 2 Hawk. P. C. c. 35, s. 3.

questioned. Was I to ask them whether the defendant was misled by the inaccuracy in the information, and had come less prepared to make his defence than he would have been if the officer, instead of being described by the name he passed by, had been distinguished by a name by which he was not known? This would have been absurd.

I think now, that even if there may be circumstances in which such a question should be put to the Jury, the present was not a case requiring it. There was no fact in controversy—no doubtful or contested fact. In truth, through the whole of the trial, it was considered purely as a point of law. It occurred to no one person engaged in the cause, to view this point in any other light. Mr. *Jervis*, in his address to the Jury, never once adverted to it. He must have considered it as gone by, until he should have an opportunity of arguing the question of law before the Court; that law arising out of the account of himself given by the witnesses. Nothing obliges a Judge to request a Jury, in express terms, to form and indicate an opinion upon facts which are assumed for certain. I am of opinion, therefore, upon full consideration, that there was not, in this respect, any miscarriage on the trial.

I may add to these observations, that in the case of the Baroness *Turkheim*, no question whatever was put to the Jury upon the subject; when the account she gave had been heard, the rest was considered as law, and referred to the twelve Judges, who appear to have treated it as a question for them, and who thereupon thought that the usage would cure the inaccuracy in the statement of the name.

There is another objection to this count. It is there stated as matter of inducement, that in the case entered as a case of toys, the officer found certain goods, other than toys, to wit, 100 pounds weight of bugles, which had been landed without due entry, whereby they were forfeited and liable to be seized, and then the charge is, that the bribe was offered to induce the officer to pass them

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unnoticed. Now, it is stated, that the goods found in the case, which were other than toys, were not bugles, as averred in the information, but were beads. It is contended that this variance is fatal to the verdict on this count.

It appears to me, that this objection bears a strong analogy to that which I have just disposed of. The first observation I must make is, that, whether bugles or beads, they were equally forfeited and liable to seizure. Bugles bear rather a higher duty than beads, but they are both liable to some duty, and whether they are the one or the other, being entered as toys, they were equally liable to seizure, and equally subjected the importer to penalties. The offence of offering a bribe to procure them to be overlooked, which is the offence to be tried, was the same, whether their proper denomination was beads or bugles. The objection, therefore, is not an objection affecting the real merits of the charge, but it arises out of a supposed rule, that the commodity, the importation of which occasioned the offence, must be accurately described.

It is now necessary to advert to the evidence. The information calls them bugles. Some were produced at the trial. It will not be material to state the precise language of the witnesses respecting them; the result of it is certain and unquestionable. The fair result is, that the commodity would generally be called beads, because they partake of the globular form; but at the custom-house they are usually called bugles: they are reported as bugles, entered as bugles, pay duty as bugles, and, if exported again, are exported as bugles. Every importer knows all this, concurs in it, and not only speaks but acts upon it; all parties concerned in the transaction know them by that name, and call them by that name only. I do not think it necessary to look deeply into the reason of this, but the fact is unquestionable. This is said to be an extortion at the custom-house, in order to levy the higher duty: perhaps the Crown

could explain it. If that question were before us, the course of inquiry which it would occur to me to take, would be to look into the act, and to consider whether, upon the true construction of the act, this commodity was meant by the Legislature to be charged with the duty imposed upon bugles. It would lead me to a much more extensive examination into the language used as to these commodities, not only by the vulgar, but by good authors, and perhaps into former acts of Parliament *in pari materid*, than is necessary upon the present occasion.

I think it due to the officers of the customs to suppose, that, if called upon, they would be able to account for the course they have taken as to this commodity, and as to this duty. I am the more persuaded that the conduct of the commissioners is not a mere bare-faced extortion, because the merchant importers have so long and universally submitted. It is hardly an answer to this remark to say, that it is so small an object, as not to be worth disputing; it certainly is not shewn to be so, and I think the contrary is rather to be inferred from the evidence; for the importation of this commodity under the name of bugles is spoken of as of frequent occurrence. Besides, there is not wanting sufficient spirit in the English people to resist the incroachments of authority, even when uncalled for by any great pecuniary interests. However, I wish to have it understood, that I do not mean to pledge myself to any opinion upon this subject. I do not enter into it, because I think it immaterial to the present cause: it is not the rate of duty which is now in question. What is material to the present discussion is, that the article is called in this information by the name which all the parties to this transaction uniformly give it, and have given it for years, in all transactions connected with importation or exportation, in all transactions connected with the customs. The question which I am to answer, therefore, is, whether this commodity is not properly named in this information,

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when it is called as it always is at the custom-house, in every transaction respecting it. The rule respecting the name of the officer, seems to me to afford the rule for this. I cannot, consistently with my opinion upon that subject, doubt respecting this. All the reasoning, and all the authorities, are equally applicable to it: the object is not to mislead the defendant: what danger is there that the defendant should be misled as to the charge? He might have been misled if they had been called beads, and the arguments of variance would have been stronger, because they would have received an appellation which they are never known by in these transactions. The defendant would have said, you call them beads in the information, but they are bugles. If they had been reported, they must have been reported as bugles; if I had entered them, I must have entered them as bugles; if I had paid the duty, it should have been the duty imposed upon bugles; if I had exported them, I should have exported them as bugles: therefore, you have mis-named them when you call them beads, and this information cannot be supported. This argument would have been stronger than any which the present circumstances afford him. Therefore, the safest mode of describing, is that which has been adopted in this case. It might be difficult to find another rule equally satisfactory.

Dr. *Johnson* defines a bugle, "a shining bead of black glass;" so that, according to him, this ornament is not excluded from being a bugle, because it is a bead. But I repeat, that I do not mean to touch the question as to the duty that is demandable for this commodity, and I abstain from giving any opinion upon it.

Upon the present discussion, *viz.* the description in the information, the invariable usage to treat these at the Custom-house as bugles, the habit of all parties to give them that name, and to import, pay the duty, and to export them as such, is sufficient in my judgment for the

present argument. Therefore, I think the objection cannot be sustained, and the count is valid. It may be proper to add, though in my opinion it is not necessary, that in the conversation in which the bribe was offered, the defendant adopted this name; for *Dabbs* said to him—"here are some bugles," and then he said—"I will give you 10*l.* if you will not notice them."

It was urged, that the Jury ought to have been desired to say, whether the articles produced were beads or bugles. As I am of opinion that their being known by the name of bugles was sufficient, it follows, that, in my opinion, it ought not so to have been put to them. I might as well have desired them to consider whether the officer had been christened *Thomas Dabbs*, or *Thomas Tyrrel Dabbs*. In *Sull's* case, the Jury might as well have been desired to consider whether Baroness *Turkheim* was, in fact, the Christian name or surname of the prosecutrix; and, in those cases in which it has been held, that if a parish is stiled by its popular name it is sufficient, though the popular name be not the name of consecration, it might as well be put to the Jury to say, whether the popular name was the name of consecration. In the case of *Williams v. Burgess (a)*, that point was not put to the Jury. In every one of these cases it would be putting a question to the Jury, which the Courts have thought indifferent to the issue, for the very point decided in them is, that the name of usage is a sufficient substitute for the real name, as there is no danger of the party being misled by it.

If it be meant that the Jury should have been asked whether it was the usage to call these bugles, I must say, that upon that subject there was not the slightest contrariety of evidence, nor the least doubt. It would have

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been a waste of time, and would have had no other effect than to withdraw the attention of the gentlemen who formed the Jury, from the real question in the cause. It was certainly not withdrawn from the Jury, but left to them as involved in the issues which they were to try, and upon which they were to pronounce a verdict.

I have stated, that the Crown obtained verdicts on the fifth and sixth counts against the defendant, for being concerned in unshipping, the duties remaining unpaid. In the fifth count, the goods unshipped are stated to be bugles, and also glass. In the sixth count they are stated to be glass. Upon the trial, evidence was given of two importations, one by the *Elbe*, which gave occasion to the offer of a bribe; the other by the *Regent*. I did not understand any serious objection to be made to the fifth count, which charges both bugles and glass. The rule is, that the verdict may be entered on the fifth count only; this relates to the importation by the *Elbe*. The fact, that the packages by the *Regent*, to which the sixth count particularly related, also contained glass, cannot be disputed; but the defence is now put upon a different ground: it is said, that they were not imported, because they were landed (which, *prima facie*, is an importation,) under what is called a bill of sight.

In order to explain this, it is necessary to state, that the act 6 *Geo.* 4, c. 107, s. 2, enacts, that no goods shall be unladen, nor shall bulk be broken, before due report of the ship, and due entry of the goods shall have been made. The report is to be made by the master. By the 16th and 17th sections, the importer is to make the entry, and the entry is to contain a full description of the goods, and the duties are to be paid. All these things are required to be done before the landing. As it may happen that the importer may not be able to give that minute description of the goods which the act requires to be con-

tained in the entry, a provision is made by the 23rd section for that case. The 6 Geo. 4, c. 107, s. 23, is to this effect:—that, if the importer of any goods, or his agent, after full conference with him, shall declare upon oath, before the collector or controller, that he cannot, for want of full information, make a perfect entry thereof, it shall be lawful for the collector and controller to receive an entry, by bill of sight, for the packages or parcels of such goods, by the best description which can be given, and to grant a warrant thereupon, in order that the same may be landed, and may be seen and examined by such importer in the presence of the proper officers; and within three days after any goods shall have been so landed, the importer shall make a perfect entry thereof, and shall either pay down all duties which shall be due and payable upon such goods, or shall duly warehouse the same according to the purport of the perfect entry or entries so made for such goods, or for the several parts or sorts thereof. That measure was resorted to in this case; the defendant made the affidavit; a bill of sight was obtained; and the packages were landed by force of it. Then the event happened which induced the Jury to find for the crown, upon the sixth count. The case was examined, a false partition was discovered, the officer, *Dabbs*, with a gimblet, made a hole through, upon which the defendant, who was present, said—“What are you about, *Dabbs*, you’ll break the glass?” And one of the witnesses swore that *Hawkes*, the defendant, stated more than once, that he knew that there was glass in that division or concealment. A great quantity of glass was found. Now, it appears to me, that this bill of sight was no protection to the landing without an entry, because it was evidently a fraudulent measure. *Hawkes* knew there was a concealment, and glass in it. That is the short ground on which it appears to me, that the verdict

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is a just verdict upon this count, and ought not to be disturbed. I am of opinion, therefore, that the rule should be discharged.

GARROW, B., concurred.

VAUGHAN, B.—As the Lord Chief Baron wishes to have this considered as his individual judgment, and as I have had no opportunity of knowing what the judgment was, except, in general terms, that the judgment was in favour of the Crown, I will state my reasons for concurring in that opinion, although I have no difficulty in saying, that in the general result I agree.

The first four counts in the information are framed with a view to the specific charge of offering a bribe. Now, in this, as in every other case, the Crown can recover only *secundum allegata et probata*. Therefore, it becomes necessary to examine the allegation, and to examine the proof.

With respect to the allegation, the charge is, that one *Thomas Dabbs*, being an officer of the customs, on examination of a case of goods imported from beyond the seas, and entered in the name of *T. Horne & Company*, discovered, to wit, one hundred pounds weight of bugles landed without due entry, whereby those goods became forfeited and liable to be seized; and that the defendant, well knowing the premises, offered to *Thomas Dabbs* a bribe of 10*l.* if he would take no notice of the said bugles, but pass the same; the said offer being made to induce him to neglect his duty, whereby the defendant forfeited 500*l.*

There have been four objections taken, upon two of which I shall say nothing, because I concur entirely in the judgment, for the reasons given by the Chief Baron with respect to those objections. I mean the objection with

respect to the master's report, and also with respect to the bill of sight, which I think, under these circumstances, was no protection to the goods. But, with respect to the other two objections, I will offer my reasons for agreeing that the information may be supported.

The two objections taken against the verdict were, that the proof had failed to establish two material and substantive allegations of fact, namely, that any bribe was offered to *Thomas Dabbs*; and secondly, that *Thomas Dabbs* had discovered any bugles landed without due entry. I understand the objections on the part of the defendant were substantially these, that the information must fail, because there was no proof that any bribe was offered to *Thomas Dabbs*, nor any proof that any bugles were discovered, and those are two substantive allegations of fact.

Now, the question will be, whether or no these two, if they be substantive allegations of fact, are or are not established by the proof. In the first place it is said, that the name of the officer was mistaken, and that that is a fatal variance. It is then said, that the articles, or the goods themselves that were discovered, were not bugles but beads, and that that also was a fatal variance; and if those objections were well founded in fact, it does appear to me that the defendant would have reason to complain that the verdict should stand against him upon either of those counts.

Now, first as to the name. I agree, if the proof had stood nakedly on the answer to the question upon cross-examination as to the name—that the name was *Thomas Tyrrel Dabbs*, without further explanation, that the variance would have been fatal, because *Thomas Tyrrel Dabbs* is not *Thomas Dabbs*. But when, upon further inquiry, it appeared that the witness was as well or better known by the name of *Thomas Dabbs* than by the name of *Tho-*

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mas Tyrrel Dabbs; I should say that that fact being undisputed, or, if disputed, being found by the Jury, there was no longer any variance; and the name answering the description in the information, it became a sufficient *designatio personæ*.

Now, on looking at the evidence, I find it distinctly admitted that he was as well, and might be better known by the name of *Thomas Dabbs* than by the name of *Thomas Tyrrel Dabbs*; but it was contended, as a clear proposition of law, that that would not suffice, but that he must be known by the name of *Thomas Dabbs* only, and that proposition of law was reserved for the opinion of the Court. So that the fact was admitted; but the defect, in point of law, was the question intended, and that only, to be submitted to the opinion of the Court.

Now, with regard to the name of the officer: the result upon this part of the case is the same as if there had been a plea in abatement, and an issue had been joined upon the question, *Dabbs* being the defendant, instead of being an officer, and the Jury had found that he was better known by the name of *Thomas Dabbs* than by the name of *Thomas Tyrrel Dabbs*. That was the effect of the admission of the counsel of the defendant at the time of the trial; he contending, at the same time, that it would not do, for, in point of law, it was not sufficient that he was known as well by the name of *Thomas Tyrrel Dabbs*, but he must be known by the name of *Thomas Dabbs* only. Now that proposition of law I controvert, and assert the contrary.

The second objection is with respect to the articles, which, it is said, were beads and not bugles. Now, I conceive that this also was a substantive allegation of fact to be found by the Jury. Unless expressly withdrawn from their consideration by the Lord Chief Baron, it must be taken that they have found it, and upon this evidence they have found it in my judgment correctly.

Now, what is the allegation, and what is the evidence upon this part of the case? The allegation is, that *Thomas Dabbs* had discovered, "to wit, one hundred pounds weight of bugles."

Then, what is the evidence upon this part of the case? The defendant says: "What is the matter?" Upon which the officer replies: "I have found some bugles, which," he says "I shewed at the time." So that it is not simply the declaration of the officer, that he has found bugles, but that he has found some bugles which he shews to the defendant at the time. Upon which the defendant then said: "If I would pass them unobserved, and not take any notice of them, he would give me 10*l*." So that the defendant treats them as bugles. They are shewn to him, and he converses respecting them as bugles, and he offers a bribe to the officer to pass them as bugles; therefore there is a most distinct admission on his part that they were, in point of fact, bugles.

If this had been an information filed for the recovery of duties upon bugles, the defendant defending himself on the ground that they were not bugles, but beads, the duty upon which he had offered to pay, the question might have been very different: that is, supposing he was not hampered by any admission. If there had been an information filed against him for not paying duties upon bugles, and he had said I have paid duty upon beads, then would have come the question—are they bugles or are they beads? The question then would have been different, and the inclination of my opinion would be, that they were beads and not bugles; but I protest against deciding that point, because it does not appear to me to be necessary in this case. The point at present to be considered is, whether the defendant did not, by his conduct and conversation, admit them to be bugles for every purpose required

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by this information; the Jury have found that he did, and, in my opinion, the evidence justifies that finding.

Now, I have said that I consider this as a substantive allegation of fact, to be found by the Jury. Was it then withdrawn expressly from their consideration, or left as a fact incorporated in their finding, although their attention might not have been prominently and specifically drawn to it? It was matter of much discussion. The Jury were pressed at great length upon the subject as a question of fact for their consideration, and contradictory evidence was offered upon it. The Lord Chief Baron, at the close of his summing up, leaves all the points in the case as questions of fact for the Jury. It is true, he states it as his own opinion, and as his impression, that the mode of dealing with them at the custom-house at all times, both upon importation and exportation, and the defendant's acts and conversation with relation to them, satisfied him that, for the purposes of this information, they ought to be considered as bugles, and to that direction I can see no objection.

Under these circumstances, therefore, and for the reasons I have stated, upon the only two points upon which I have thought it necessary to give the reasons for my opinion, I concur in the judgment of the learned Chief Baron. The name, I think, is correctly stated, because the question is the same as if there had been a direct issue joined upon the fact, and found in favour of the Crown, that he was as well known by the name of *Thomas Dabbs*, as of *Thomas Tyrrell Dabbs*; and then, as to the bugles, without considering whether it is necessary or not to prove, as a material allegation, that they were bugles or beads, I am of opinion, that, in this instance, the defendant, by his acts, his conversation, and his conduct, has so distinctly admitted them to be bugles, that he is estopped from controverting that point. For these reasons, there-

fore, I concur most entirely with the judgment that has been pronounced by the Lord Chief Baron.

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BOLLAND, B.—I concur with the rest of the Court in thinking, that the judgment ought to be given for the Crown. It is unnecessary for me, after the very elaborate view that has been given of the case by the Lord Chief Baron, and after the observations that have been made by my brother *Vaughan*, to go generally into the case. It seems to me, that, in deciding this case, we should not be considered as deciding any substantive question of law, the material points of this case appearing to me to depend altogether upon its own circumstances; it is more matter of fact, perhaps, in many parts of it, than matter of law. Therefore, taking this view of the case, I shall content myself with saying, that I agree with the rest of the Court in thinking that the judgment should be given for the Crown.

Rule discharged.

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THE KING *v.* JONES.

A Sheriff cannot retain against the Crown a sum of money deposited by an agent of the Crown, to cover the expenses of a sale by auction of property seized under an extent, and sold under a *venditioni exponas*.

IN this case, a writ of *venditioni exponas* was issued, directed to the Sheriff of *Glamorganshire*, to sell certain property of the defendant, seized under an extent. Upon the delivery of this writ to the under-sheriff, by an excise officer, the under-sheriff said, that the property was not of sufficient value to sell by auction, as the poundage would not defray the expenses; and that he would not sell by auction without specific directions; but the officer said, that the property must be sold by auction. At the same time the officer paid to the under-sheriff 5*l.*, as he said, by mistake, instead of 5*s.* to which the Sheriff was entitled for his warrant; but the under-sheriff swore that this sum had been paid to defray the additional expense occasioned by a sale by auction. Handbills were circulated, and the property was sold by auction in the usual way.

Clarke, having obtained a rule calling upon the Sheriff of *Glamorganshire* to shew cause why he should not refund to the solicitor of the excise the sum of 4*l.* 15*s.*, being the balance of the 5*l.*, after deducting the 5*s.* allowed for the warrant—

Maule shewed cause, and contended, that it was clear that, as between the Sheriff and a subject, the Sheriff would be entitled to charge for the extraordinary expenses occasioned by a sale by auction; and even if the Sheriff was bound upon a Crown process to sell by *public* sale, he was not bound to employ an auctioneer, or to incur expense with a view to give publicity to that sale. He contended also, that the Crown could only be entitled to this money in a case where the retention of it would be against good conscience; whereas here it was paid expressly for the sale by auction, which the officer had insisted upon having.

Clarke, in support of the rule, urged, that the Sheriff was, in this case, bound to sell by auction, and that the taking of a deposit, before he would perform his duty, was extorsive and illegal. He further contended, that the Sheriff was, in the first instance, only entitled to his fee and poundage, and that any extra allowance could only be obtained by application to the Court (a).

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GARROW, B.—This is an application calling upon the Sheriff of the county of *Glamorgan* to shew cause why he should not refund to the officer of one of the public boards the sum of 4*l.* 15*s.*, under these circumstances:—An extent issued, under which there was issued a writ of *venditioni exponas*, directed to the Sheriff. It seems to be admitted to be the duty of the Sheriff, without any special directions, to sell by auction in the usual way, and, of course, at the expense necessarily incident to an auction. The facts suggested by the affidavits are, that, upon the delivery of the writ to the Sheriff, the agent of the Crown said, you must sell by auction, and that he made a deposit of 5*l.* to indemnify the Sheriff. It appears to me, that, on this state of facts, no deposit made by the agent of the Crown, (perhaps in ignorance of the extent of the duty of the Sheriff), can entitle the Sheriff to retain that sum, deposited to induce him to do that which, without the deposit, he was bound to do.

VAUGHAN, B.—Under the circumstances, I think it the

(a) The whole sum levied is returned after deducting the poundage. An extra allowance claimed by the Sheriff upon an extent in aid must be moved for in open Court. *R. v. Jones*, 1 Price, 205. If the application appear reasonable, a rule is granted, calling upon the prosecutor, or other parties interested in resisting the claim, to shew cause why it should not be allowed. *R.*

v. Mainwaring, 2 Price, 67; *R.* in aid of *Gardner v. Fereday*, 4 Price, 131. Where the Sheriff charged five *per cent.* for an auctioneer to sell malt taken under an extent, the Court disallowed the charge. *R. v. Crackenthorp*, 2 Anst. 412. The extra expenses of a Sheriff under an extent in chief may be obtained under the stat. 3 Geo. 1, c. 15, s. 4, by application to the Board.

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safer course to hold, that the Sheriff, in this case, is liable to refund, although there may be some difficulty upon the facts. The answer of the Sheriff admits, that he received this sum as a deposit. It comes to the question, therefore, whether the Sheriff can be entitled to more than is allowed to him by law. It appears to me, that the Sheriff was bound to take the necessary steps for the sale, and it is admitted to be the usual course that he should sell by auction. If extraordinary expenses are incurred, he may be remunerated by application to the Court.

BOLLAND, B.—The Sheriff is entitled to poundage, and to poundage only; for any thing extra, he must come to the Court. According to the case of *Woodgate v. Knatchbull* (a), if this had been a case between party and party, the contract suggested might have been available; but I do not see how the agent can bind the Crown; more particularly, as in this matter he clearly acted beyond the scope of his authority. I therefore am of opinion, that the rule should be made absolute.

Rule absolute (b).

(a) 2 T. R. 157.

(b) There does not appear to be any authority, by statute or otherwise, that the Sheriff is bound to sell by *auction* goods seized under an extent, and sold under a *venditioni exponas*. By the terms of the writ, he must sell for the best price; which, with the word *exponas*, seems to imply that the goods must be exposed to public sale; but the ex-

pensive machinery of a sale by auction is, as compared with this writ, of comparatively modern introduction, and there seems to be no reason why, in the absence of authority, a public officer should be burdened with this expense in the execution of Crown process, when it is decided, that, in the case of a subject, he cannot be so burdened, without a special arrangement.

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1830.

ALEXANDER v. ANGLE.

[In Error from the Court of *King's Bench*.]

SLANDER.—The declaration contained six counts.

There was an inducement applicable to all the counts, stating that the plaintiff below was a keeper of livery stables, and carried on the trade and business of a livery-stable keeper. The last count stated, that, before &c., one *John Peer* had become a bankrupt, and the plaintiff below was about to prove a debt justly due to him by the said *John Peer*, under a commission of bankrupt, theretofore awarded and issued against the said *John Peer*, yet the said defendant below, well knowing &c., and contriving &c., on &c., at &c., in a certain discourse &c., of and concerning the said plaintiff below, and of and concerning the matter in the introductory part of that count mentioned, and of and concerning him in his trade aforesaid, maliciously spoke and published of and concerning the said plaintiff below, and of and concerning the said matters last-mentioned, these false, malicious, and defamatory words following, that is to say, you (meaning the said plaintiff below) are a regular prover under bankruptcy, (meaning that the said plaintiff below *was accustomed to prove fictitious debts under commissions of bankrupt*); you (meaning the said plaintiff below) are a regular bankrupt maker; if it was not for some of your (meaning the said plaintiff's below) neighbours, your (meaning the said plaintiff's below) shop would look queer. It is all true, and you (meaning the said plaintiff below) may bring as many actions against me (meaning the said defendant below), as you like.

At the trial, a general verdict was found for the plaintiff below, and judgment having been entered up accordingly, a writ of error was brought.

Where a count for slander, after alleging that the plaintiff was a livery stable keeper, and was about to prove a debt under a commission of bankrupt, stated that the defendant spoke of and concerning the plaintiff, and of and concerning the matter in that count mentioned, and of and concerning the plaintiff in his trade, these words; "you are a regular prover under bankruptcy (meaning that the plaintiff *was accustomed to prove fictitious debts under commissions of bankrupt*), you are a regular bankrupt maker:"—*Held*, that the count could not be maintained; for the words were not actionable as spoken of the plaintiff in his trade; nor were the words as laid actionable, as imputing a crime punishable by law, because the *innuendo* was broader than the meaning of the words, which were unexplained.

ed by prefatory averment, and did not of themselves necessarily import a crime.

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Platt, for the plaintiff in error, was stopped by the Court.

Kelly, for the defendant in error, was desired to support the last count. The objections to the last count are twofold—*First*, that the words do not impute to the plaintiff a specific offence, punishable by law—and *secondly*, that the *innuendo* enlarges the sense of the words used. Although words do not necessarily impute a specific offence, punishable by law, yet if, according to ordinary understanding, they imply a charge of that description, and the Jury find that the charge is implied, it is sufficient. Admitting that there is nothing in the words which must *necessarily* import a criminal charge, yet, taken with the context, they clearly imply it. If the words will bear the construction put upon them, it is sufficient if the Jury adopt that construction; for it is not necessary that the words should directly import the charge, or that they should be capable of no other construction. The law upon this subject is correctly laid down in the note to *Craft v. Boite* (a) as follows: “It is an established rule, that slanderous words must be understood by the Court in the same sense as the rest of the world would ordinarily understand them.” *Woolnoth v. Meadows* (b), and *Roberts v. Camden* (c), are authorities for this point. In the latter case, the words did not directly impute perjury, but that the plaintiff was under a charge of a prosecution for perjury. The words used were capable of different constructions; they might impute that the plaintiff had committed perjury, they might also mean that he was improperly prosecuted for perjury. The words were ambiguous, and it was for the Jury to find the meaning with which they were used. The same reasoning applies to the present case; if the words are

(a) 1 Wm. Saund. 242.

(b) 5 East, 469.

(c) 9 East, 95.

capable of the construction put upon them, (and the Jury have found, that they were used in that sense), it is clear, that the offence charged is punishable by law; for, debts under a commission of bankrupt are proveable only upon oath; and the taking of such oath falsely is, under the late bankrupt act, perjury. But the words are also, in this count, alleged to have been spoken of the plaintiff in his trade. Slander of a man in his trade, to be actionable, is not confined to imputations of insolvency, but it is sufficient, if it impute mal-practices in his trade. *Com. Dig. "Action on the Case,"* (D, 25, 26, 27).

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TINDAL, C. J.—In this case, the plaintiff in error contends, that one of the counts of this declaration, upon which a general verdict was taken, is bad in law. If it be so, as the damages are entire, the case must go down again for trial. The Court of error are of opinion, after hearing the argument, that the last count of this declaration is bad in point of law. That count alleges that the plaintiff below, before the committing the grievances complained of, carried on the trade of a livery-stable keeper, and that the defendant below, well knowing the premises, in a conversation concerning the plaintiff, and concerning his trade, and concerning the bankruptcy of one *Peer*, as stated in that count, uttered the words following—"you are a regular prover under bankruptcy, (meaning that the plaintiff was accustomed to prove fictitious debts under commissions of bankrupt); you are a regular bankrupt maker; if it was not for some of your neighbours, your shop would look queer. It is all true, and you may bring as many actions against me as you like."

Now, it is alleged, on the behalf of the plaintiff in error, that this count is bad, inasmuch as it does not contain any charge against the defendant in error in the way of his trade, or any charge of a criminal nature. It is said on the other side, that it may be taken as a charge relating

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to his trade; and secondly, that it amounts to an imputation of perjury. This does not seem to me to fall within that class of cases which relates to imputations upon a person, with reference to his trade. To say of a carpenter, that he is a bungler, is actionable, for it imputes to him a want of skill; to say of a vendor that his goods are rotten, or that he keeps false books, which is an imputation of dishonesty in his trade, is also actionable; so, likewise, it is actionable to impute insolvency to a trader, which affects his credit; but the words in this case are applicable as well to a man not in trade, as to a trader, and are not, therefore, actionable as referrible to the plaintiff's trade. Then, do the words used impute a crime punishable by law? It is observable upon this point, that the *innuendo* is larger than the natural meaning of the words. It is a clear rule of law, upon all the authorities, that an *innuendo* cannot introduce a meaning broader than that which the words naturally bear, unless connected with proper introductory averments. The well known case of *Hawkes v. Hawkey* (a), is the best illustration of this rule. In that case, the word fore-sworn was explained by the *innuendo* to mean perjury in a judicial proceeding, but the declaration was held bad, the word fore-sworn being *verbum ambiguum*, because it was not previously alleged that the conversation took place with reference to a judicial proceeding. So, here, if it had been stated that the conversation took place with respect to the defendant proving fictitious debts under commissions of bankrupt, the question might have been different. Two cases have been cited, *Woolnoth v. Meadows*, and *Roberts v. Camden*. It is sufficient to say, that, on the face of the record in those cases, it was apparent to the Court, that the words did import the imputation of a crime. No man can read the record in the case of

(a) 8 East, 427.

Woolnoth v. Meadows, without seeing, at once, what was the meaning of the imputation conveyed by the words. So, in the other case, there is a direct imputation of perjury. In these cases, therefore, the actions might have been maintained, as well without as with the aid of an *innuendo*. Upon these grounds, we are of opinion that the last count is bad, the judgment must be reversed, and a *venire de novo* awarded.

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Judgment reversed.

PITT v. ELDRED.

Exch. of Pleas.

UPON a motion by *Cowling* for a *distringas* upon a *venire*, it was certified by the Master, and adopted by the Court as the practice, that the affidavit must state, the residence of the defendant; that there have been at least three attempts to serve the writ upon him; that when the party attempting to make the service went to the residence of the defendant, and was unable to find him, he stated to some person, at the residence of the defendant, his object for so calling, and the time when he would call again, for the purpose of seeing the defendant; and the reasons for which he believes the defendant kept out of the way to avoid being served.

Requisites of the
affidavit for a
distringas upon
a *venire*.

The affidavit not stating these facts, the rule was refused.

Rule refused (a).

(a) This point arose subsequently during this term, when the Court laid down the same rule.

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1830.

Where a petitioning creditor's debt is proved by the depositions under the provisions of the 6 Geo. 4, c. 16, s. 92, it is not competent for the defendant to prove that such petitioning creditor's debt was a fraudulent contrivance between the bankrupt and the petitioning creditor.

YOUNG and Another, Assignees of IRELAND, v. TIMMINS.

IN this case, notice to dispute the petitioning creditor's debt had been duly given. The debt sought to be recovered was one for which the bankrupt might have sued.

At the trial, at the last Summer Assizes for the county of *Warwick*, before *Alexander, C. B.*, the depositions were put in as proof of the petitioning creditor's debt. Twelve months had elapsed between the adjudication and the trial. The defendant proposed to prove that the petitioning creditor's debt was a fraudulent contrivance between the bankrupt and the petitioning creditor, who was also one of the assignees, and a party to the record. The Lord Chief Baron rejected the evidence, on the ground that the depositions were conclusive evidence of the debt, under the statute 6 Geo. 4, c. 16, s. 92.

Hill now moved for a new trial.

The clause in question provides, that the depositions shall be conclusive evidence of the matters contained therein, if the bankrupt does not give notice of his intention to dispute the commission within the periods limited by the statute. That provision could not be intended to apply to a case where the bankrupt, being a party to the fraudulent concoction of the debt, is interested to support the commission, rather than to give the notices referred to. Besides, the depositions can, at all events, be only, *prima facie*, an estoppel, and proof of fraud opens the whole matter. Thus, a fine or other record, though an estoppel and conclusive, is yet liable to be opened by evidence of fraud. Fraud vitiates every instrument, and the party may say that the deed or fine, though otherwise conclusive, is not a deed or fine, if it be fraudulent. So here, these depositions, the result of fraud, are not conclusive

depositions under the provisions of this act. They are not the depositions intended by the act. At all events, as this is a new point on a very important act of Parliament, it is a fit case to be considered.

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BAYLEY, B.—The words of the statute are, that the depositions shall be conclusive in all actions at law or suits in equity, brought by the assignees for any debt for which the bankrupt might have sued. It does not follow, however, from these words, that they are to be conclusive, upon a petition to the Chancellor to supersede the commission. But where an act of Parliament says, in express terms, that the depositions shall be conclusive, we cannot refine upon the meaning of the words used, and say, that they are not to be conclusive in a case to which the act applies. It is of great importance that parties should understand what it is that they are to be prepared to try; otherwise, such questions might come upon the party by surprise at the trial. I think that the Legislature intended to prevent the agitation of such questions in cases like the present. The object of the Legislature was, that the depositions should be conclusive at the trial, leaving the parties to agitate the merits of the commission elsewhere.

VAUGHAN, B.—The depositions are in the nature of an estoppel. The remedy is elsewhere.

GARROW, B., and BOLLAND, B., concurred, and the rule was—

Refused.

Exch. of Pleas,
1830.

HENSHAW *v.* WOOLWRICH.

Where persons, who are shewn to be bail in other actions, justify as bail by affidavit, they must swear that they are worth the sum required beyond what will satisfy their debts and their other engagements.

IN the affidavit of justification in this case, the bail swore that they were worth double the amount of the debt after payment of their debts, but did not swear that they were worth that sum beyond their debts, and what would be sufficient to satisfy their other engagements.

Wightman opposed these bail, upon an affidavit that they were bail in two other actions.

BAYLEY, B.—When in the Court of *Common Pleas*, I objected to the justification of bail upon this ground, and it was then decided that the bail should swear that they were worth the sum required beyond what would satisfy their debts and their other engagements. I think it reasonable that it should be so, because, if the bail had justified in these actions in person, they must have sworn that they were worth the sum required beyond their debts, and their liabilities in the other actions.

The Court directed the affidavit of justification to be amended in this respect, and granted an extension of time for that purpose.

Revenue,
1830.

In the Matter of the Estate of EWIN, deceased.

IN this matter, the usual order was obtained, under the statute 42 Geo. 3, c. 99, s. 2, calling upon the executor to shew cause why he should not deliver an account of the legacies and property of the testator, and pay the legacy duties. In opposition to this rule, affidavits were filed, from which it appeared, that the testator, who was domiciled in *England*, died possessed of considerable property, in the *American, Austrian, French, and Russian* funds, which funds were transferable, and the dividends payable in those respective countries only. It appeared further, that the debts of the testator had been paid out of personal property in this country, and that the residuary legatee had required the executor to transfer into his name, the funds in those countries respectively. It also appeared, that the stock had been transferred into the name of the executor, and that he had dealt with and transferred the dividends to the legatees, by means of powers of attorney.

American, Austrian, French, and Russian stock, the property of a testator domiciled in this country, is liable to legacy duty.

Brougham and *Lynch* shewed cause.—They contended—*First*, that the property was in the nature of real property. *Secondly*, that it was local, being payable and transferable only in the countries in which the funds were. And *thirdly*, that, if personalty, it was not liable to legacy duty, till received in *England*, which in this case it could not be, because the debts of the estate had been discharged, and the executor had been required, and intended, to transfer the funds to the legatees in the foreign countries. They cited *Logan v. Fairlie* (a), and *Day v. Fairlie* (b).

The *Attorney-General* and *Amos*, *contra*, urged that this was personal property, and was to be distributed ac-

(a) 2 Sim. & St. 284.

(b) 1 Russ. 117.

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1830.
In re EWIN.

according to the *lex domicilii*, and was therefore liable to the legacy duty. They cited *Somerville v. Somerville* (a), *Pipon v. Pipon* (b), *Thorn v. Watkins* (c), and the Countess *Da Cunha's* case (d).

ALEXANDER, L. C. B.—I have not had, during the course of this argument, any doubt, notwithstanding the great ability evinced upon the part of those who contend that this duty ought not to be paid. It seems to me, according to the true meaning and construction of this act of Parliament, that it must be paid. This is an act which imposes a duty upon legacies and shares of personal estate, and the duty attaches the moment they are paid; and the transaction pointed out as that upon which the duty is to be paid, is to be evidenced by the receipt. The fact is, that it is a charge upon the personal estate which belonged to the intestate or testator, and which is to be handed over to the legatee.

Then the question is, whether the circumstances of this case bring the legatee and the executor of the estate within those descriptions that are comprised in this act. In the first place, it must be personal estate. I agree entirely that the circumstances stated in these affidavits prove this, if there were any doubt about it, to be personal estate; because, as is stated, the executor has taken it, he has dealt with it as executor, and he has, as executor, authorized the delivery of it over to the legatee of this personal estate. Under all these circumstances, how can it be contended, with any plausibility, that this is not personal estate? Then, so far as the subject matter of the thing goes, it is clearly within the act of Parliament.

But then, can it be said, that the persons concerned in this transaction, are not within this act of Parliament? The act says, that every personal or moveable estate, shall be charged with these duties upon all legacies and succes-

(a) 5 Ves. 750. (b) Ambl. 27. (c) 2 Ves. 37. (d) 1 Hagg. Eccl. 237.

sions; and then it goes on to charge upon these legacies and successions particular sums, according to the amount or value. The words are general, "every person."

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It must be construed, I think, that this particular act, in speaking of legacies, is confined to *Great Britain*. Where persons die in *India*, whose estates, though the estates of *British* subjects, are distributed in *India*, and are delivered over to the several legatees, whether pecuniary or residuary legatees in *India*, it never has been the practice, nor was it intended by this act of Parliament, that such estates should be chargeable with the duty. Under these circumstances, although I do not doubt but that the reasons given by the Vice-Chancellor, in the case decided by him (a), were satisfactory, and were justified under the particular circumstances of that case, it requires the particular circumstances of that case, to bring such legacy and payment within the operation of this act of Parliament. But it never can be doubted that the act of Parliament was meant to include the estate of a person domiciled in *England*, a subject of this country, an Englishman, whose executors are living in this country. It can never be doubted that the act was meant to make his estate subject to the charge, and that persons claiming under him, and receiving part of that estate, were liable to contribute to the revenue of this country by force of this act of Parliament.

Upon what grounds is it contended that this estate is not liable? Because the duties on probates and administrations would not have extended to this particular fund. This argument does not appear to me to make any difference in this case. By the act of Parliament, the duty upon the probate is only imposed in respect of that fund, which the executor is to obtain in a particular province of this country by force of that probate. If there be a personal estate in the province of *York* and *Canterbury*, and

(a) *Logan v. Fairlie*, 2 Sim. & Stu. 284.

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a probate be taken in the province of *York*, the duty is paid upon the property in that province only, and it is not paid upon the other property until a probate be taken in the province of *Canterbury*.

This is made apparent by the very terms of the act, for it says, "where the estate and effects for or in respect of which such probate, letters of administration or confirmation respectively, shall be granted or expedied," evidently confining the charge upon the probate to those particular estates to be recovered by force of that administration. But when it speaks of the legacy duty, it is charged upon the amount of the estate itself, to be handed over upon the receipt, which the executor, to save himself from the penalty, ought to take, before he pays the money.

I cannot doubt, therefore, in this particular case, that the legacy duty is chargeable upon this property; because, in point of fact, it is under the administration of the executor; and though he is not bound, in order to get at it, to take out a probate or administration, still it is by force of the interest he takes under his testator's will, that it is disposed of; he hands it over to the legatee, whether he is pecuniary legatee or residuary legatee; it is by force of his act it is transferred to such legatee, and it is the very case that it was the intention of this act to fix with the duty. I am of opinion, therefore, that there can be no doubt that this property is liable to the legacy duty.

BAYLEY, B.—From the first moment I knew any thing of the state of facts in this case, it appeared to me to be a case perfectly free from doubt. It is the case of a will made by a *British* subject domiciled in *England*; and it is to be executed by an *English* executor, and to operate upon that which, throughout, in my opinion, is *English* personal property. It was pressed by the counsel, that this property was to be considered as being, in the country in which it was, real property. There is nothing in any part of the affidavits to shew that such was the charac-

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ter that properly belonged to it, but some reliance was placed upon a supposed analogy between the case of this property and property in the *English* funds; which, in the creation of those funds, might originally be considered as being real property, and descendible to the heir, but which, very soon afterwards, was considered to be personal property, and not descendible to the heir, but to go as personal property would go. Does it follow, because the *English* funds were originally considered as real property, that the *French* and *American* and *Russian* funds were also so considered? It would be for the party who insists that this is the character which belongs to the property in question, and who ought to know the character of the property of which he is the owner, to shew that such was the character of this property. But the circumstances mentioned on behalf of the Crown, namely, that the name of the executor was suffered to be introduced in the books, that the executor was suffered to deal with the fund, and that his directions were followed as to the dividends, satisfy my mind that this is to be considered as personal property in the place where it is payable; and that, consequently, we are not warranted in considering this as being real estate. If it is not real estate, it is personal estate; and if it is personal estate, is it in any respect to be considered different from personal property abiding in this country? There is no doubt but that the amount, when you are receiving the dividends, will be payable in the place in which, by the constitution of these funds, the dividends are payable, and that will be *America*, *Paris*, or *Petersburgh*. But you are not to look at the place where the thing is payable or transferable, but when once you have ascertained that it is personal estate, then you are to ascertain what are the rules of law with regard to personal estate; that personal estate being at the time not locally in this kingdom, but being at the time locally situated abroad.

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Now, what is the rule with respect to it? It is clear, from the authority of *Bruce v. Bruce* (a), and the case of *Somerville v. Somerville*, that the rule is, that personal property follows the person, and it is not, in any respect, to be regulated by the *situs*; and if, in any instances, the *situs* has been adopted as the rule by which the property is to be governed, and the *lex loci rei sitæ* resorted to, it has been improperly done. Wherever the domicile of the proprietor is, there the property is to be considered as situate; and, in the case of *Somerville v. Somerville*, which was a case in which there was stock in the funds of this country, which were at least as far local as any of the stocks mentioned in this case are local, there was a question whether the succession to that property should be regulated by the *English* or by the *Scotch* rules of succession. The Master of the Rolls was of opinion, that the proper domicile of the party was in *Scotland*. And having ascertained that, the conclusion which he drew was, that the property in the *English* funds was to be regulated by the *Scotch* mode of succession; and if the executor had, as he no doubt would have, the power of reducing the property into his own possession, and putting the amount into his own pocket, it would be distributed by the law of the country in which the party was domiciled. Personal property is always liable to be transferred, wherever it may happen to be, by the act of the party to whom that property belongs; and there are authorities that ascertain this point, which bears by analogy on this case, namely, that if a trader in *England* becomes bankrupt, having that which is personal property, debts, or other personal property, due to him abroad, the assignment under the commission of bankrupt operates upon the property, and effectually transfers it, at least as against all those persons who owe obedience to these bankrupt

(a) 2 Bos. & Pul. 229 (n).

laws, the subjects of this country. In this case, therefore, it appears to be clear, that this is to be considered as being *English* personal property. Why, then, if it is *English* personal property, reducible by an *English* executor into possession, so that he may have it in its full value in this country, is not the legacy duty to attach upon it? It was put in a strong way to illustrate the argument by the Attorney-General, that if there had been a deficiency of assets in this country to meet the debts of the testator, it would have been the duty of the executor to have sold this property, and to have brought it bodily into this country, as that which was to be resorted to; and that it would have been a *devastavit* if he had not adopted that plan if there were debts.

Then, if it has the character of *English* property, can there be any doubt but that it falls within this rule that attaches upon all legacies and all successions to personal or moveable estate. The rule, as to probates, has been pressed upon our consideration, and the difference between those things *bona notabilia*, and those things not *bona notabilia*. The question as to *bonum notabile* is essential only to ascertain the *situs* of the property, and to ascertain, with regard to the probate, out of what limits the power that is to clothe the executor with the means of acting upon it, shall issue, and it is *bonum notabile* in one place or another according to its *situs*. But *Bruce v. Bruce* decides that the *situs* determines nothing in a case like the present, for the executor has the power of removing the property from its *situs*, and getting it into his own country. Now, the probate duty is only with reference to the *situs* of the property within the limit of the probate. In the course of the argument, the case was put of a *York* administration and a *Canterbury* administration. The duty, with reference to those, will be regulated by the amount of property in each of those dioceses, but, if there is other property not in those dioceses, but property abroad, with reference

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to which there may be no probate essential, or with respect to which, the only probate will be the probate belonging to that country, that will not be taken into the amount of duty paid, either upon the *Canterbury* administration or the *York* administration. The cases referred to of *Logan v. Fairlie*, and *Hay v. Fairlie* do not seem to me to bear upon the present question, because, there the party was not domiciled within the limits, within which the duties referred to by this act of Parliament attach. In each of those cases the party was resident in *India*. It is quite clear, when you come to look at the legacy acts, that they are co-extensive with the limits of this kingdom, and this kingdom only, and do not extend to the territorial possessions of the Crown in *India*. Therefore, in neither of those cases did the question arise, whether the legacy duty was payable upon the whole of the property the testator left. It appears to me there is a plain distinction between those cases and the present case, because those were cases where the party was domiciled in *India*, not having a domicile in the limits within which this act applies; but the present is a case of a man having an *English* domicile, all whose property of this description is considered *English* personal property.

GARROW, B., and VAUGHAN, B., concurred.

Rule absolute (a).

(a) As to the distinction between the grant of probate, which is regulated by the *situs* of the *bona mobilia*, and the distribution of the

property, which depends upon the domicile of the deceased, see 1 Wms. Saund. 275, n. (a), by Paterson & Wms.

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The ATTORNEY-GENERAL v. KEY and Others.

THIS was an information for penalties. The first count charged, that the defendants did knowingly harbour, keep, and conceal, certain goods liable to the payment of duty on the importation thereof, which had then and there been imported and illegally unshipped, the duties thereon not having been first paid or secured, that is to say, 500*lbs.* weight of tobacco, &c., and 400 gallons of foreign *Geneva* and brandy, whereby, &c.; concluding for the penalty. The information also contained other counts, upon which no question arose.

An information for harbouring goods, liable to the payment of duty, is not supported by evidence of harbouring goods, which, by reason of the packages in which the goods are imported, are prohibited.

At the trial, before *Alexander*, L. C. B., the Jury found a special verdict upon the first count to the following effect: that the defendants imported into the united kingdom the said tobacco in that count mentioned, in packages containing 28*lbs.* weight each and no more, which packages were not, at the time the same were so imported as aforesaid, packed in any outward package, containing 450*lbs.* weight at the least; and the *Geneva* and brandy in that count mentioned, in casks containing four gallons each, and no more; and that the same were not imported into the united kingdom, to be legally deposited or warehoused for exportation; and that the defendants did knowingly keep and conceal the said goods so imported, &c., in the terms of the first count of the information. They found for the defendants upon the other counts of the information.

Upon this finding, the question was, whether the goods were not absolutely prohibited in consequence of the quantities in which they were imported; and, therefore, whether the information was supported by the finding, the statute upon which it was founded, 6 *Geo.* 4, c. 108, s. 45, applying in the alternative to goods for which the duties had not been paid, or to goods prohibited.

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Walton, for the Crown, contended, that, although goods in such quantities were included in the list of prohibitions in the statute 6 Geo. 4, c. 107, s. 52, the importation thereof was only prohibited *sub modo*, and not absolutely.

John Jervis, contra, insisted, that that clause operated as an absolute prohibition, and relied upon the statute 6 Geo. 4, c. 107, s. 128, by which all goods, the importation of which is restricted, "on account of the packages," &c., shall be deemed prohibited goods.

Cur. adv. vult.

ALEXANDER, L. C. B., now delivered the judgment of the Court.—This was an information for penalties, for harbouring and concealing smuggled goods. The first count averred, that the defendants harboured and concealed certain goods liable to the payment of certain duties on the importation thereof, which had then and there been imported and illegally unshipped, the duties thereon not having been first paid or secured. The goods are stated to be 500*lbs.* of tobacco, and 400 gallons of foreign brandy, and 400 gallons of foreign *Geneva*. The penalty, the Crown having used the option given to them by the act, is the treble value. There were several other counts. The Jury found for the defendant on the issue joined on all the counts except the first; on the first they found a special verdict to this effect—that the said defendants, on the day and year in the said first count of the said information in that behalf alleged, imported into the united kingdom the said tobacco in the said first count mentioned, in packages containing 28*lbs.* weight each, and no more; and that the said defendants imported into the united kingdom foreign brandy and foreign *Geneva*, in the said first count of the said information mentioned, in casks containing four gallons each, and no more; and

that the said tobacco, foreign brandy, and foreign *Geneva*, in that count within mentioned, were not imported into the united kingdom, to be legally deposited or warehoused for exportation; and that the said defendants did knowingly harbour, keep, and conceal, and did knowingly permit and suffer to be harboured, kept, and concealed, the said goods in the said first count of the said information mentioned, at the same time and place in that behalf within mentioned, they, the said defendants, at the said time when they so harboured, kept, and concealed the same goods, well knowing that the same had been imported and unshipped in manner and form aforesaid in this kingdom, without any duties thereon having been first paid or secured." There is no doubt, therefore, of the defendant's harbouring and concealing run goods.

The objection to the information, and to the recovery by the Crown, is, that the goods in the state in which they are represented in the special verdict to have been imported, are absolutely prohibited and forfeited; whereas, the averment in the information is, that they were liable to duties; and the offence stated is, having imported them without having paid those duties.

The provisions on this subject are contained in the act of 6 *Geo.* 4, c. 107. The 52nd section of this act contains the prohibition against the importation of certain goods, and restrictions on the importation of others. The goods, so prohibited, and so restricted, are detailed and specified in lists, which are found in the body of the act; in which lists of restrictions are the following:—certain spirits, (among which are the spirits referred to in this information), unless in casks containing not less than forty gallons, or in cases containing not less than three dozen reputed quart bottles. Then, as to tobacco—among the restrictions is, tobacco, except from the *East Indies*, in hogsheads, casks, chests, or cases, of 450*lbs.* weight; then, in a subsequent clause, namely the 128th clause, it is pro-

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vided, "that all goods, the importation of which is restricted on account of the packages, shall be deemed and taken to be prohibited goods."

Now, the information describes these goods, which the act says shall be prohibited, as goods which may be imported on paying duty, and the complaint is, that they had been imported without paying or securing the duty.

It is said that the Crown cannot know in what packages they were imported; this is true: *prima facie*, they would be deemed to have been imported in the packages in which they were found. But all difficulties would be obviated by inserting a double set of counts. There is some inconvenience in this, and some expense; but we think that that inconvenience and that expense would not warrant us in sustaining the conviction for one offence upon an information charging another. Therefore we think there must be judgment for the defendants.

Judgment for the defendants.

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An instrument in the following terms, "nine years after the date hereof, I promise to pay to &c., the sum of &c., with lawful interest, provided D. M. shall not return to England, or his death be duly certified in the meantime," is no evidence of money lent either on a special or *indebitatus* count.

ASSUMPSIT.—The declaration contained two special counts; the one stated, that, in consideration the plaintiffs, at the special instance, &c., would lend the defendant a certain sum of money, to wit, 75*l.*, the defendant promised to pay them the sum of 75*l.* with interest, nine years after August 1, 1820, *provided one David Morgan should not return to England, or his death be duly certified in the mean time.* The count then averred, that the plaintiffs did advance the sum of 75*l.*, and negatived the above proviso. Breach—that defendant had not paid the 75*l.* The other special count was similar, but stated the consideration to be, that the plaintiffs would suffer

the defendant to receive 75*l.* then in the hands of *David Jones*. Esch. of Pleas,
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The declaration also contained a count for interest, the common money counts, and one upon an account stated between the plaintiffs and defendant. Pleas—General issue, and statute of limitations.

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At the trial, before *Goulburn, J.*, at the last *Summer* Great Sessions for the county of *Carmarthen*, the plaintiffs, in support of their case, produced the following instrument—

“Nine years after the date hereof, I, *Stephen Jones*, (the defendant), of &c., maltster, do hereby promise to pay to *John Morgan* and *Samuel Morgan*, (the plaintiffs), the sum of 75*l.*, with lawful interest, provided *David Morgan*, the brother of the said *J. Morgan* and *S. Morgan*, shall not return to *England*, or his death be duly certified in the mean time; for value received. Dated the 24th day of *August*, 1820.

(Signed) “*Stephen Jones*.”

The plaintiffs proved the execution of this instrument by calling the attesting witness, and then called the uncle of *David Morgan*, who proved that his nephew had left *England* twenty-five years ago, and had never been heard of since.

On the behalf of the defendant it was objected, that there was no evidence to support either the special or any of the common counts. As to the former, the consideration averred was not proved; and as to the latter, the note or instrument produced could only be enforced by a special declaration upon it. The learned Judge was of opinion, that the objection was well founded, and nonsuited the plaintiffs, but gave their counsel leave to move to enter a verdict for 75*l.*, and interest from the date of the instrument. Accordingly—

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Russell, Serjt., obtained a rule *nisi* for that purpose.
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R. V. Richards and *E. V. Williams* now shewed cause.—The plaintiffs having entirely failed to prove the averments of the consideration in the special counts, the only question is—whether the instrument they produced will maintain any of the common counts. If it is to be urged, that the count, upon an account stated, may be so supported, then the statute of limitations is an answer; because, the only proof of any statement of account is what took place when the instrument was drawn. Besides, it is not allowable to apply such a special agreement as the one in question to a common *indebitatus assumpsit*. There is no instance of the plaintiff being allowed to rely on a contract which depends on a contingency, on any but a special count. The agreement in this case is an agreement in the nature of a wager; for, whether the plaintiff be entitled or not, depends upon a matter of chance. Now, it has been often decided, that a plaintiff cannot enforce a wager under the common counts. *Bovey v. Castleman* (a), *Hard's case* (b), *Walker v. Walker* (c), *Leaves v. Reinard* (d). This contract is, in its nature, in no way different from a contract of insurance, and no one ever attempted to recover on a policy under the common counts.

But it will be urged, that the instrument is admissible under the count for money lent, because it imports to be for “value received.” Now, it may be conceded, that, if this had been a promissory note, payable nine years after date, it would have been evidence to support that count; but this is clearly not a promissory note; it is not declared upon as such, but as an agreement dependent on a con-

(a) *Ld. Raym.* 69.
(b) *1 Salk.* 23.

(c) *12 Mod.* 78.
(d) *5 Mod.* 60.

tingency. "Value received," does not, in such a contract, import the nature of the value received, nor the parties from whom or to whom it passed; it might not have been in money, it might have been received by a third party, or advanced by him. Again, it might be conceded, that if this had been a promissory note, "value received" would have imported value to an amount corresponding with the sum the note promises to pay, because the law will presume against usury; but where the payment under an agreement depends, as here, on a contingency, no such correspondence can be presumed, inasmuch as the value received will necessarily vary with the probability of the contingency, and will be greater or less, according as the probability of the event happening is less or greater; therefore, the words "value received" do not in this case import a definite amount, as in the case of a promissory note.

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Russell, Serjeant, and John Evans, contra.—The first special count was proved, and the plaintiffs are entitled to recover on the count for money lent, or on that on an account stated. If there was any evidence of money lent, the plaintiffs were clearly entitled to recover. It may be conceded, that the present instrument is not a promissory note, for it is payable on a contingency; but it is submitted that the principle of giving a promissory note in evidence, upon the common counts, where there is a variance on the special counts, is applicable to this case. In a book (a) of very great authority on this subject, the principle is stated in this manner—"A bill is *prima facie* evidence of money lent by the payee to the drawer; and a note, of money lent by the payee to the maker; and each, consequently, of money had and received by the drawer or maker to the use

(a) Bayley on Bills, 186.

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of the holder, and of money paid by the holder to the use of the drawer or maker." In a note to the above passage it is stated, that *Holt, C. J (a)*, expressed his disapprobation of declaring upon promissory notes, (before the statute of *Anne*), as if they were within the custom of merchants; and assigned as a reason, "because there was so easy a method to declare upon a general *indebitatus* count, for money lent." The same was laid down in *12 Mod. 380*; and, in *Bur. 1525*, Lord *Mansfield* says—"I do not find it any where disputed, that an action upon an *indebitatus assumpsit*, generally, for money lent, might be brought on a note payable to one or order." In *Phillipps on Evidence (b)*, after stating the above doctrine, it is said, "the note itself, as between these original parties, is evidence of money lent, and is admissible as a paper or writing to prove the defendant's receipt of so much money. It was admissible in this point of view before the stat. of 3 & 4 *Ann. c. 9*, which enabled the plaintiff to declare upon the note; and that statute did not alter the rule, but supplied only an additional concurrent remedy." It appears, therefore, that, before the statute of *Anne*, the instruments which, by that statute, have become negotiable promissory notes, need not have been specially declared on, but were evidence of money lent upon the common money counts. The circumstance, therefore, of the present instrument not having the essentials of a note under the statute, cannot alter the rule of its being admissible in evidence, as a paper or writing admitting the receipt of money. [*Bayley, B.*—The difference between this and an ordinary promissory note is, that the latter is payable at all events; and therefore it implies that so much money has been lent; but here, as it is only payable conditionally, the presumption does not arise; because, if all the money had

(a) Lord Raym. 758.

(b) 2 Phill. on Ev. 10.

been lent, it would be payable at all events. The circumstance that it is not to be paid if the party return, would lead to the inference that the money was not lent. There is not even a provision in the instrument, that, in the event of *D. Morgan's* return, it should be repaid to any other person]. *Bishop v. Young* (a), is an authority to shew that the words "value received" import a consideration, and that debt will lie on a note containing those words. Here, the promise is to pay, with lawful interest, for value received. These words clearly raise a *prima facie* presumption, that the consideration was money lent.

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BAYLEY, B.—This seems to me to be a case of no difficulty. The declaration contains special counts on a consideration of money lent, and a count for money lent, and one upon an account stated. If there were no evidence to support the consideration of the special counts, there was none to maintain the common count for money lent. If there had been any evidence to support the account stated, a difficulty would have arisen on the statute of limitations, which would probably have been a bar; for there does not appear to have been any evidence of an account having been stated within six years; but I do not think that there was evidence of any account having been stated between these parties, of money due from the defendant to the plaintiffs. I agree with the cases which have been cited for the plaintiffs, and with the *dicta* of Lord Chief Justice *Holt*, and Lord *Mansfield*, that an ordinary promissory note is evidence of money lent as between the payee and the maker, but then it must be a promissory note payable at all events. In such cases, a presumption that the money was lent, may well arise from the promise to repay it. But here, the money is to be paid on a contingency. If it had been really lent,

(a) 2 Bos. & Pul. 80.

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why should the repayment be conditional? What is there in the form of this agreement to make out that money was lent or an account stated of money due? It is an agreement to pay (not at all events, but if *David Morgan* do not return, or his death be duly certified) for value received, and with lawful interest. It might be value received in goods, or for work and labour. The circumstance of its being for value received would not justify a Court or Jury in saying that it was given for money lent. But the words "provided *David Morgan* does not return to *England*, or his death be duly certified," raise in my mind an unanswerable presumption that this instrument was not given for money lent, but for some other consideration. In the absence of any thing which would justify a Judge in directing a Jury that this note was evidence of money lent, or a Jury in finding that the money had been lent, I am of opinion that the nonsuit was right, and that this rule must be discharged.

GARROW, B., concurred.

VAUGHAN, B.—The question in this case is, whether the plaintiffs were properly nonsuited at the trial. Their allegation was, that money had been lent—now, what did they prove? The only evidence they gave was the proof of the instrument, and that *David Morgan* did not return to *England*. It is said, that, as between the maker and payee, the note was evidence of money lent. In any case, that only raises a presumption, which is liable to be rebutted. It appears to me, that, in the present case, it is impossible to raise such a presumption, when we look at the terms of the instrument, which is only for the payment of the money, provided *David Morgan* do not return, or his death be certified. I am, therefore, of opinion, that this rule should be discharged.

BOLLAND, B.—I agree with the decision and reasoning of the rest of the Court, and shall merely notice one part of the case, which has been ingeniously pressed upon us by Mr. *Evans*. He argued, that an instrument of this description was evidence before the statute of *Anne*, upon the money counts, and that it did not therefore require the essentials of a note since the statute. I consider that an instrument like the present could not, at any time, have supported the money counts. It was decided, before the statute, that a note payable on a contingency was not a good note (*a*). Long before the statute, the practice had prevailed amongst traders of sending these instruments into the world, and Courts of justice entertained and acted upon them. They stood before the statute on exactly the same footing as at present, as to being evidence on the money counts. When Lord *Eldon*, therefore, spoke, in *Bishop v. Young*, of notes before the statute, he must be considered as speaking of notes as they now are, so far as relates to the present question.

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Rule discharged.

THE defendant applied for costs of the rule under the statute 5 *Geo.* 4, c. 106, the record being out of the Court of Great Sessions.

Per Curiam.—In an ordinary case they would be costs in the cause. There is no reason why the plaintiffs should raise the point at the expense of the defendant. Let the rule be discharged with costs.

(a) *Pearson v. Garrett*, 4 Mod. 242.

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Where an attorney sued out a writ in a superior Court for the recovery of a disputed debt under 40s. upon written instructions signed by the client, but brought to him by a person who was in the habit of collecting small debts, and of occasionally acting for attorneys:—*Held*, that the attorney could not recover his costs, unless it were shewn, that, before suing out the writ, he made such inquiries from his client with respect to the claim as a prudent attorney ought to have made.

ASSUMPSIT upon an attorney's bill for costs in an action in this Court, at the suit of the now defendant, against one *Adams*, to recover a debt under 40s.

At the trial, before *Vaughan*, B., at the last *Summer Assizes* for the county of *Devon*, it was objected by *E. Lawes*, Serjt., for the defendant, that the present action was not maintainable, because the debt, being under 40s., was recoverable in the county court; and this Court would have staid the proceedings.

The learned Judge gave leave to enter a nonsuit upon this point, and *E. Lawes*, Serjt., accordingly obtained a rule for that purpose, relying upon the cases of *Allison v. Rayner* (a), *Kennard v. Jones* (b), *Wellington v. Arters* (c), and *Stean v. Holmes* (d). And he contended, that it was the duty of the attorney to have advertised his client of the risk he ran in proceeding with such an action.

The case was now argued by *Fraser*, for the plaintiff, and Serjt. *E. Lawes*, for the defendant. But it not appearing from the report of the learned Baron, that there was any evidence that the debt in the original action arose within the jurisdiction of any inferior Court, the judgment of the Court proceeded upon other facts, which appeared from the report of the learned Baron, and which they fully stated in delivering their opinions.

BAYLEY, B.—This was an application to enter a nonsuit, upon the ground that the debt sought to be recovered in the original action was under 40s.; and, therefore, being recoverable in an inferior court, that the attorney did not

(a) 7 B. & C. 441; 1 M. & R. 241.

(b) 4 T. R. 495.

(c) 5 T. R. 64.

(d) 2 Wm. Bla. 754.

do his duty to his client in commencing the action in a superior Court, without having fully apprized his client of the consequences. It did not appear, from the report of the learned Baron, that the cause of action arose within the limits of the county court, and, therefore, there was no ground for that objection.

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On reading the report, another point occurred for the consideration of the Court; but that point not having been saved at the trial, the Court would not be warranted in entering a nonsuit on that ground: still, however, it is the duty of the Court to do that which the facts and justice of the case require. This is an action for an attorney's bill, and it is the duty of the Court, in such a case, to protect the client, when it appears that the justice of the case requires that such protection should be given. In this case, it appears that *Gideon*, who was in the habit, according to the evidence, of acting for attornies and of collecting debts, and had, on a former occasion, collected for the defendant a debt of *1l. 16s.*, was employed by the defendant to get in a debt of *1l. 18s.*, alleged to be due to him from a person of the name of *Adams*. *Adams* denied the debt, upon which *Gideon* told the defendant that his only remedy was to sue *Adams* in the superior Courts. By the desire of the defendant, *Gideon* spoke to the plaintiff upon the subject, and he also was of opinion that the defendant must sue in the superior Courts. Afterwards, at the instance of *Gideon*, the defendant signed a paper addressed to the plaintiff, desiring him to issue a writ. The plaintiff acted on that direction: the writ was sued out; the declaration prepared; and then the defendant (*Adams*) refusing to compromise the action, the suit was determined, and a debt of *8l.* and a fraction incurred, for which the present action was brought. It appears, by the evidence, that the defendant was at the office of the plaintiff, but there is no ground to believe, that, when the plaintiff originally sued out the writ, he had had any personal communication with the de-

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pendant, but, on the contrary, it appears that he acted upon the written authority only. I do not say, that it is essential in all cases that an attorney should see his client before he sues out a writ; there may be instances in which a personal communication may be impossible; but there may also be cases in which it is the imperative duty of the attorney to see his client before he sues out a writ. Now, the debt, in this case, is very small, and the instructions are received through a person not competent, in contemplation of law, to give the party adequate advice. The debt is also disputed by the person from whom it is claimed. Under these circumstances, it seems to me, that, considering the situation in which *Gideon* stood, it was the duty of the plaintiff to have seen the client, and to have inquired whether there was or was not evidence to support the case; and if he took upon himself to act merely upon the authority handed to him by *Gideon*, without a personal interview with the client, he did so at his peril. He ought to have inquired into the circumstances of the case, and particularly, the debt having been disputed, he ought to have inquired by what means the debt could be proved. Had he made such a communication, and received a satisfactory answer, it might have been sufficient; but, without any interview with his client, I am of opinion that he acted at his peril in suing out the writ.

There are some cases which, although they do not go the length of this case, afford a principle whereon the Court should act. In *Ex parte Whatton*(a), where it appeared that an attorney and a person who stood in a situation similar to that in which *Gideon* appears to have stood, had been in the habit of acting together, the one in getting in small debts, and the other in suing for them under his directions, and an application was made of a criminal nature to strike the attorney off the rolls, the Court were

(a) 5 B. & A. 824.

of opinion, inasmuch as the whole profits were taken by the attorney, that the case was not within the meaning of the act of Parliament (a); but Lord *Tenterden* was of opinion that it was a most improper practice, and said distinctly, that "it was the duty of an attorney to communicate with his clients, and to give his attention to their concerns." In *Hopkinson v. Smith* (b), an attorney living in one place, who had a clerk living in another, with the appearance of acting as a principal, and from time to time taking instructions from different clients, brought an action for a bill of costs incurred in proceedings upon instructions so taken by his clerk; and the Court of *Common Pleas* was of opinion, that such conduct was highly improper, though their judgment proceeded partly upon other circumstances.

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No man can doubt what the duty of the plaintiff was in this case. The debt is less than the expense of suing out the writ. If the client had been present, would it not have been the bounden duty of the attorney to have inquired what proof he had of the debt? No such inquiry was made before the writ was sued out. When the writ is sued out, instructions for the declaration are necessary, and it appears by the bill that at that time the present plaintiff was totally ignorant of the cause of action. The cause proceeded to the declaration, and then, *Adams* refusing to refer, the suit was abandoned. Under these circumstances, I am of opinion that it is the duty of the Court, with a view to protect the client, not to suffer the present verdict to stand. Therefore, what I propose is, that there should either be a *stet processus*, or, if the plaintiff refuse to accede to that arrangement, that it should be referred to the Master to say whether, at the time of suing out the writ in the original action, the plaintiff had made those inquiries from the client, which a prudent, cautious, and properly acting attorney ought to have made, in justice

(a) 22 Geo. 2, c. 46, s. 11.

(b) 1 Bing. 13; 7 B. Moore, 23.

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and honesty to his client. The costs of this action would, in this event, abide the result of the report in these particulars. If the plaintiff will not accede to either of these propositions, I am of opinion that there should be a new trial.

The rest of the Court concurred.

Rule accordingly.

JONES v. SIMPSON and DERBYSHIRE.

A notice of action against a magistrate, under 24 Geo. 2, c. 44, is sufficient to warrant a writ, and proceedings against the magistrate and a constable jointly.

Where notice was given to the magistrate, as above, and the plaintiff, after the expiration of a month, sued out a writ against the magistrate alone, and afterwards abandoned that writ, and sued out another against the magistrate and constable jointly:—*Held*, that the notice was sufficient to warrant the second writ, and proceedings thereupon.

TRESPASS against the two defendants, a magistrate and constable, for assault and false imprisonment.

At the trial, before *Park, J.*, at the last *Summer Assizes* for the county of *Stafford*, it appeared that the notice of action against the defendant *Simpson*, the magistrate, stated that the plaintiff would sue out a writ of *quo minus* against him, without noticing the other defendant. Shortly after the month (after the service of notice) had expired, the plaintiff sued out a *quo minus* against the defendant *Simpson* alone, which he in a few days abandoned, and then commenced the present action, by suing out a *quo minus* against the two defendants. A verdict passed for the plaintiff, with leave for the defendants to move to enter a nonsuit.

. In the commencement of this Term, *Taunton* accordingly obtained a rule *nisi*. He contended that the notice of separate process was not sufficient to maintain an action commenced by joint process; and he distinguished *Agar v. Morgan (a)*, as being upon an act of Parliament which required a notice of action; whereas, in the present case, notice of the intended writ or process is to be given, according to the decision of the Court of *King's Bench* in

Lovelace v. Curry (a). He argued that the authority of *Exch. of Pleas, 1839.*
Bar v. Jones (b) was not to be relied on, because that
 case proceeded entirely upon the authority of the case of
Agar v. Morgan, and the circumstance of the latter case
 being upon a different act of Parliament was not adverted
 to. He contended, also, that great mischief might arise, as,
 in such case, the magistrate might lose his opportunity of
 making a tender, as he might very likely think that he had
 a good defence to the action to be founded on the first
 writ, by the evidence of the constable, and therefore,
 might reasonably refrain from making a tender, and then
 his expected defence would be taken away, by the con-
 stable being joined in the second action; whereas, if he
 had originally had notice of a joint action, he might have
 tendered amends, knowing that he could not prove his
 defence without the evidence of the constable. He con-
 tended also, that, where a writ had been sued out conform-
 ably with the notice, the notice became *functus officio*,
 and then there was no notice to support the second writ.

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C. Phillips, and *Whitcombe*, now shewed cause.—The notice in this case contained all the requisites which the statute 24 Geo. 2, requires; there was a notice in writing of the intended writ or process, which notice also explained the cause of action, and could not mislead the magistrate, in the manner suggested, as all trespasses are, in their nature, joint as well as several. But there are three express authorities on this point. *Agar v. Morgan* was attempted to be distinguished, because the act of Parliament in that case required a notice of the cause of action only. It is impossible to say, that there is a misdescription in the one case if not in the other. If notice of a several cause of action is not a misdescription of a joint cause of action, can it be said that notice of a se-

(a) 7 T. R. 631.

(b) 5 Price, 168.

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verbal writ or process is a misdescription of a joint writ or process? Any difficulties as to tendering amends must apply equally to both cases. It is to be observed also, that this Court in *Agar v. Morgan*, proceeded on the ground of the law being as now contended for on behalf of the plaintiff with regard to the statute 24 Geo. 2, for they adopted the reasoning of the counsel who argued from the analogy of that case to cases of notices to magistrates, under 24 Geo. 2; and Mr. Baron *Richards* says—“I am materially guided by the consideration, that a constable may be joined in an action against a justice of the peace, (who is entitled, under 24 Geo. 2, to notice of the writ and cause of action), although the intention of joining the constable be not expressed in the notice.” *Bax v. Jones* is also an express authority; and the case of *Ferguson v. Sir William Addington* is there said, by Mr. Baron *Garrow*, to have decided the same point. *Robson v. Spearman* (a) is also an authority; for, although the objection was not noticed by the Court in their judgment, it was distinctly urged by counsel, as one ground for granting a rule to enter a nonsuit, which the Court refused.

Russell, Serjt., and *R. V. Richards*, in support of the rule.—When the notice was followed, immediately after the expiration of the month, by a writ, in conformity with such notice, it became *functus officio*, and could not afterwards support a second writ. The magistrate, when the first writ was abandoned, had a right to suppose that the plaintiff intended to drop his proceedings, and had no need to tender amends. If the plaintiff could sue out two, he might sue out any number of writs upon one notice. The statute intends, that every writ sued out should be grounded on a notice. If a second notice had been

(a) 3 B. & A. 493.

given, to which the magistrate was entitled, to support the second writ, he would probably have tendered amends.

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BAYLEY, B.—The question in this case is, whether, under the statute 24 *Geo. 2*, c. 44, a plaintiff is tied down to the first writ which he sued out after the notice of action, in a case where he has afterwards sued out a second writ *ejusdem generis*, and substantially for the same cause of action; and I am of opinion, that he is entitled to avail himself of such second writ, provided it be warranted by the notice. The statute provides, that a notice in writing shall be given of the intended writ or process, in which notice shall be specified the cause of action. Now, what is the meaning of the words intended writ or process? It seems to me, that, if the writ correspond in character with that which is described by the notice, it is such a writ as the party may proceed upon, notwithstanding there may have been a prior writ sued out; and I think that the words, intended writ or process, ought not to be construed to attach themselves to any one individual writ only, but to one of the nature and character described in the notice.

It has been objected, that the right of tender given to the magistrate by this statute, might be affected by allowing the plaintiff to abandon his first writ, and sue out a second; but the defendant, in such case, has every benefit which the legislature intended; and he has something more, for he has an additional opportunity and time. The circumstance of there being two writs, deprives the party of no benefit, but enlarges the time for making the tender; and in my mind, it would be a narrow construction to hold, that the intended writ or process means the writ or process first sued out. We ought not to put a forced construction upon a provision which goes to restrain the general right which a plaintiff has to sue; for, whenever an act of Parliament is to be construed, which is to restrain such general right, it ought to be construed strictly, though

Exch. of Pleas, not, however, in such a manner as to contradict the spirit of the statute.
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The second objection which has been made is, whether, if you state in the notice your intention to sue out a writ against a magistrate, you are at liberty to sue one out against the magistrate and constable jointly. Finding that decided in no less than three cases, I think that it is not a point which we are at liberty to consider as open to discussion; I say three cases, because it is impossible to distinguish *Agar v. Morgan* from the present case. If a cause of action against one is no less a cause of action against him because it is a joint cause of action against him and another, then a writ against one is no less a writ against him, because it is a joint writ against him and another. Besides, in that case, though it was decided on a different act of Parliament, the Court illustrated it, and their judgment proceeded on the analogy to cases under the statute 24 Geo. 2. Then comes the case of *Bax v. Jones*, which is distinctly in point. The next case is *Robson v. Spearman*, in which the Court of *King's Bench* was of opinion, that such a notice was sufficient. I therefore think that this rule must be discharged.

GARROW, B.—In the case in 5 *Price*, the Court were called upon to review their decision in *Agar v. Morgan*, and their judgment proceeded upon full consideration.

VAUGHAN, B.—The question is, whether this act of Parliament has been complied with. The act requires a notice in writing, of the intended writ or process, and of the cause of action. In looking over the cases on this subject, I cannot help expressing my opinion that the refinement in favour of magistrates in some of those cases has been pushed to an extent beyond what a reasonable construction of the statute requires. The act was meant

for the protection of public functionaries, but we must take care that justice be not entangled by the very nice distinctions on this subject. All trespasses are in their nature joint as well as several, and there is nothing in this notice to require the action to be separate, or to mislead the magistrate in this respect. In principle and reasoning, the case of *Agar v. Morgan* is precisely similar to the present. *Bax v. Jones* is in point; and in *Robson v. Spearman* this point was distinctly taken at the bar, and the Court refused a rule to shew cause, though they did not notice it in their judgment. On principle, authority, and common sense, I think that the act of Parliament has been complied with by the notice in question, and that this rule must be discharged.

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BOLLAND, B.—I perfectly agree with the rest of the Court that this rule should be discharged. In *Robson v. Spearman*, it appears that counsel distinctly put the very point, and the attention of the Court was called to it; and though they did not find it necessary to advert to it in their judgment, they must have taken it, as well as the other points in the case, into their consideration. But the other cases proceeded on full argument. For the reasons given by my learned brothers, and on the ground that the cases cited have decided the point in question, I fully concur with the rest of the Court in thinking, that this rule should be discharged.

Rule discharged.

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BEGGIE v. LEVI.

Where, in an action by an indorsee against an acceptor of a bill of exchange, it appeared that the bill was drawn on a Sunday:—*Held*, that the bill was not void under the stat. 29 Car. 2, c. 7.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, dated 27th *December*, 1829. At the trial, before *Alexander, C. B.*, at the Sittings after *Easter Term*, the plaintiff having proved the bill, it was objected that the bill was void, because it was dated on a *Sunday*. The Lord Chief Baron saved the point; and

Platt accordingly obtained a rule for a nonsuit or new trial, relying upon the cases of *Fennell v. Riddler* (a) and *Smith v. Sparrow* (b), which, he contended, had overruled the case of *Drury v. Defontaine* (c).

Chilton shewed cause, and insisted that there was no evidence that the bill was accepted on a *Sunday*, or that it was made in the ordinary calling of the party, and he relied upon the cases of *Drury v. Defontaine*, *Bloxsome v. Williams* (d), *Sandiman v. Breach* (e), *R. v. Whitchash* (f), and *Williams v. Paul* (g).

Platt was heard in support of his rule.

Cur. adv. vult.

GARROW, B., now delivered the judgment of the Court:—This case was argued before my brother *Bayley* came into this Court, and I have the authority of the Lord Chief Baron to say, that he concurs in the judgment I am now about to deliver. The plaintiff declared upon a bill of ex-

(a) 5 B. & C. 406; 8 D. & R. 204.

(b) 4 Bing. 84; 12 B. Moore, 266.

(c) 1 Taunt. 131.

(d) 3 B. & C. 232; 5 D. & R. 82.

(e) 7 B. & C. 96.

(f) 7 B. & C. 596; 1 M. & R. 452.

(g) 6 Bing. 653.

change, drawn on the 27th *December*, 1829, by *Johnston* upon the defendant, payable three months after date, to the order of the drawer for 18*l.*, and accepted by the defendant. The declaration states an indorsement by *Johnston* to one *Richard Day*, and by *Richard Day* to the plaintiff. The declaration contained the usual money counts, and an account stated. To this, the defendant pleaded *non assumpsit*. The cause was tried before the Lord Chief Baron, and the Jury found a verdict for the plaintiff.

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This cause comes before us upon a rule obtained by the defendant, calling upon the plaintiff to shew cause why the verdict found for him should not be set aside, and a nonsuit entered. The defendant grounds his application upon the statute 29 *Car. 2*, c. 7, and contends, that the bill is void, as it bears date 27th *December*, 1829, which, in that year, was *Sunday*. By the statute relied upon, it is enacted—"For the better observation and keeping the Lord's day, commonly called *Sunday*, that all the laws enacted and in force concerning the observation of the Lord's day, and repairing to the church thereon be carefully put in execution, and that all and every person and persons whatsoever, should, every Lord's day, apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately, and that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly business, or work, of their ordinary callings, upon the Lord's day, or any part thereof, (works of necessity or charity only excepted), and that every person being of the age of fourteen years or upwards, offending in the premises, shall, for every such offence, forfeit the sum of 5*s.*" If an act is forbidden under a penalty, a contract to do it is made void, as appears by several late decisions; though the law was formerly otherwise, as is to be collected from the case of *Comyns v.*

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Boyer (a). And this Court would thereupon feel itself bound to say, that the bill in this case was void, if it were satisfied, upon the evidence in the cause, that any contract had been entered into on the Lord's day, and that the act upon which such contract proceeded was, in the words of the statute, done in the ordinary calling of the defendant, and that the plaintiff, at the time he took the bill, was acquainted with that fact. Upon reference to the notes of the learned Judge, we find no evidence to support either of these suppositions, but such as is furnished by the bill itself; by which it appears, that the day on which it was drawn was the 27th *December*, and it is admitted, that the 27th *December* was *Sunday*; but there is no proof whatever of the time when the defendant wrote his acceptance upon it. The bill, upon its face, as drawn, contains no words of contract, or even of promise. The drawer requires the defendant, three months after the date of the bill, to pay to his own order the sum of 18*l.*, but there is no obligation on the defendant to do so till he has accepted the bill. It was pressed upon the Court by the counsel for the defendant, that it must look to the date alone, and presume, that as the bill was drawn on the 27th, it was accepted on that day. But we do not think this a case in which we are permitted to act upon presumption; and if we were, the presumption arising from the known practice of merchants would be, that the bill was not accepted on the day on which it was drawn, as it is well known that the usual course in such transactions is to leave the bill at the house of the drawee for acceptance, in order that he may have time to satisfy himself, that the claims of the drawer upon him were such as to call upon him to enter into the required obligation. Upon this first want of proof, the Court would have felt no difficulty, upon the authority of *Blossome v. Williams (b)*, in discharging this rule, because it does not appear, that

(a) Cro. Eliz. 485.

(b) 3 B. & C. 232; 5 Dowl. & Ry. 82.

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any contract was entered into on the 27th. But even assuming that there was, the Court would be clearly of opinion, that it would not be competent to the defendant, who alone has been guilty of a breach of the law, to set up his own illegal act as a defence to this action, at the suit of an innocent holder of the bill. Upon the other point the Court has no doubt. In *Drury v. Defontaine* (a), it was decided, that a sale of goods on a *Sunday*, not made in the exercise of the ordinary calling of the vendor or his agent, is not void, either at common law, or by the statute of the 29 Car. 2, c. 7. This case was afterwards recognized as law by the Court of *King's Bench*, in *Bloxsome v. Williams*; and in the cases of *Fennell v. Riddler* (b) and *Sandiman v. Breach* (c), the same ingredient, *viz.* that the contract endeavoured to be impeached was made in the ordinary calling of the contracting parties, is considered as necessary; and it was held, that the statute did not apply to all persons, but to such only as have some ordinary calling; and if it had intended that no person should do any work on the Lord's day, it would have used different language. This doctrine has been acted upon in the very late case of *The King v. The Inhabitants of Whitnash* (d), where the Court of *King's Bench* held, that a contract of hiring, made between a farmer and a servant on a *Sunday*, was valid. Upon these grounds, we are of opinion, that the rule ought to be discharged.

Rule discharged.

(a) 1 Taunt. 131.

(b) 5 B. & C. 406; 8 D. & R.

(c) 7 B. & C. 96.

(d) 7 B. & C. 597; 1 M. & R.

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MELLING, Executor of MELLING, v. KELSHAW.

Where *A.*, being indebted to *B.*, gave him for security a delivery order for goods in the hands of a wharfinger, which the wharfinger accepted, and afterwards *A.*, being indebted to *C.*, gave him another delivery order for the same goods, which was taken to the wharfinger, who said that he could not transfer the goods, as he held them for *B.*, but that if *C.* could get *B.*'s order he would transfer them, and promised that he would not give up the goods without first letting *C.* know; and afterwards *B.*, his debt remaining unsatisfied, gave a delivery order for the same goods to *A.*, who gave notice of it to the wharfinger:—Held, that *C.* had no property upon which trover could be maintained against the wharfinger.

TROVER for oatmeal, laying the conversion in the life-time of the testator. Plea—Not guilty.

At the trial, before *Bayley, J.*, at the last *Summer Assizes* for the county of *York*, the following appeared to be the facts of the case:—*Evers*, a cornfactor, being indebted to one *Haigh* in the sum of 700*l.*, on the 16th *February*, 1824, gave him an order on the defendant, a wharfinger, for the delivery to *Haigh* of the oatmeal in question. This order was delivered to the defendant, and the oatmeal was by him weighed and transferred to the name of *Haigh*; afterwards, *Evers*, being also indebted to the plaintiff's testator, gave another delivery order to him for the same oatmeal, and for some peas, also in the hands of the defendant. This delivery order was given in consequence of an agreement between *Evers* and *Melling* the testator, by which the former was stated to be indebted to the latter in the sum of 114*l.* 14*s.* 9*d.*, and the latter was to be at liberty to sell the goods at certain stipulated prices, within three months, and, at the end of that period, at such prices as could be obtained. This second delivery order was also taken to the defendant, who was requested to transfer the peas, and also the oatmeal, to *Melling's* name. The defendant undertook to hold the peas for *Melling*, the testator; but, with respect to the oatmeal, he stated that he held a previous order from *Evers*, on behalf of *Haigh*, to whom he had transferred it, and, therefore, could not transfer it to *Melling*, the testator, without an order from *Haigh*. Upon this occasion, the defendant wrote, at the foot of the order, the quantity of oatmeal in his hands; and, on a subsequent occasion, said that he would not deliver the oatmeal to any person without letting *Melling*, the testator, know. In the month of *August* following, *Evers* alleged that he had discovered a mistake in the ac-

count between himself and *Melling*, the testator, and that the balance was in his favour; and he directed the defendant not to obey the order given to *Melling*. On the 1st *September*, *Evers's* debt to *Haigh* being reduced to 113*l.*, most part of which remained due at the trial, *Haigh* gave *Evers* an order for the delivery of the oatmeal, which order *Evers* sent to the defendant, with directions not to obey any order but such as he should afterwards give. A few days afterwards, *Melling's* book-keeper again applied to the defendant to transfer the oatmeal to him, when the defendant asked if he had got *Haigh's* order to that effect, and told him that he, the defendant, had got *Haigh's* order to transfer it to *Evers*. The book-keeper said, he had applied to *Haigh* for an order, but could not get it. In about a fortnight after this, *Melling's* attorney demanded the oatmeal, and offered to indemnify the defendant; the defendant said, that he thought *Melling* ought to have it, but that he wished to do right, and, being a wharfinger, he did not know what to do between the two orders. He refused then to give it up. The learned Judge directed the Jury to find for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

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Brougham accordingly obtained a rule to enter a nonsuit. He contended, that the plaintiff's testator had no property on which this action could be maintained; and further, that there was no evidence of a conversion. But the judgment of the Court not proceeding upon the latter ground, the arguments upon that part of the rule are omitted.

F. Pollock, and *Dundas*, shewed cause.—The substance of the defendant's statement, when the order was taken to him, is,—I am bound by a previous order from *Haigh*, but if you will get rid of his claim, and obtain an order from him, I will obey it. Eventually *Haigh* did give up his order.

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[*Bayley, B.*—*Haigh* had a right to the property till the whole of his debt was paid, or to give it any destination he pleased; he gave that destination in favour of *Evers*].

Evers obtained the order from *Haigh*, probably with the intention of redressing the wrong he had committed. He would naturally consider that he had been committing a fraudulent act, and would, therefore, prevail on *Haigh* to give up his order. The delivering up of the order by *Haigh* extinguished his right, and vested the property in *Melling*, the testator. Though, at the time of the delivery of the order to *Melling*, *Evers* had no property in the goods, yet, when the property was vested in *Evers*, by the order of *Haigh*, the prior delivery note to *Melling* would take effect, and the property would be vested in him. Besides, the conduct of the defendant amounted to a qualified attornment to the title of *Melling*, and to an undertaking to hold the oatmeal for him, if *Haigh's* title was got rid of. That condition was complied with, and then the defendant was not at liberty to dispute the title which he had agreed upon that condition to admit. *Stonnard v. Dunkin (a)*.

Milner, contra.—No property whatever could pass under the order to *Melling*. The order to *Haigh* was accepted by the defendant, and the property was then actually transferred by the defendant into the name of *Haigh*. Any subsequent order was a mere nullity, for the property was absolutely vested in *Haigh*. Even if the order to *Melling* had any effect, it was clearly revocable till the time when the interest vested; and, in point of fact, it was revoked by *Evers* before the fresh order was given to him by *Haigh*. There are no cases which go the length of shewing that an agent can be made the trustee for any number of consecutive parties by delivery notes,

(a) 2 Camp. 344.

given to take effect after former orders are satisfied. After the first delivery note, *Kelshaw* was the agent of *Haigh*, and not of *Evers*. Could he have refused to deliver to a third party by order of *Haigh*? He was bound to follow the direction of the owner of the property, who had power to give, and did give, a destination to the property. If there was a conditional acceptance of the order to *Melling* by the defendant, the condition was, that *Melling* should get *Haigh's* order, which was not obtained. The order of the 1st *September* from *Haigh* was not intended to benefit *Melling*, as has been supposed, but was probably intended to benefit *Evers*, and, being delivered to him, the property was vested in him.

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BAYLEY, B.—It appears to me, that the rule in this case ought to be made absolute. I disregard entirely the question of indemnity, because a stakeholder ought not to take an indemnity, if by taking it he might vary the rights of the parties. He ought to stand indifferent between the parties, and should lean to neither; and, therefore, I think that the offer of an indemnity does not alter the nature of the present case.

The first question for our consideration, and on which alone my opinion is formed, is—whether the property vested in *Melling*, so as to enable him, in his life-time, and his representatives after his death, to maintain an action of trover. The right of property is essential to maintain such an action. In this case the property belonged to *Evers*; in *February*, 1829, he gave to *Haigh* a delivery order, which *Haigh* communicated to *Kelshaw*, and to which *Kelshaw* acceded, and which, therefore, was binding on *Kelshaw*. The object of that order was, that it should cover a debt of 700*l.* due at that time from *Evers* to *Haigh*. Things remaining in that state, *Evers* gave a second delivery order to *Melling*, to cover a much larger debt due from *Evers* to *Melling*. That second order includes not

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only the goods in question, but many other goods. This order was carried by the agent of *Melling* to *Kelshaw*, and was shewn to him. *Kelshaw* objected as to part of the order, but, with respect to the peas, which are included in the order, he said he would deliver them, and signed a consent at the foot of the order to that effect; but he refused to sign any consent with respect to the oatmeal, though, at the request of the agent, he wrote down the quantity of oatmeal in his hands. But he used expressions which shew a proper willingness to do at that time what was right between the parties. He said, that he would transfer it when *Melling* got a delivery order from *Haigh*; and he also said, that he would not deliver it up without letting *Melling* know. The breach of that latter part of the promise could not afford ground for an action of trover; but if any action would lie, it must be brought in another form. The witness who proved this conversation, when sifted by cross-examination said, that, from first to last, *Kelshaw* said, that he would not transfer the oatmeal without an order from *Haigh*; if he could get *Haigh's* order, he would deliver it immediately. Now, what is the plain meaning of that language—"The property is vested in *Haigh*, I have bound myself to him, and if you will get an order from him, I will assent to it." Was such an order ever obtained? No. But it is suggested for the plaintiffs, that the substance of the defendant's promise was, that when *Haigh's* debt was removed out of the question, he would hold the oatmeal for *Melling*. If that were the meaning of the defendant, it was not so expressed; and, where an express stipulation was made for an order, it is safer to look to the language really used, and not to resort to that which is considered as equivalent to an order. It might mean, as soon as the order in favour of *Haigh* should be removed; it might also mean, as soon as *Haigh's* debt should be discharged. *Melling* did not obtain any order from *Haigh*, nor was *Haigh's* debt ever discharged. In-

stead of *Melling* getting an order from *Haigh*, and communicating it to *Kelshaw*, *Haigh* gives an order for delivery to *Evers*. He did not merely tear or extinguish the original order from *Evers* to him, but he gave a new order to *Evers*, so as to substitute *Evers* for himself. This might have been done to benefit *Melling*, but it is more probable that it was done to benefit *Evers*, because it was not the natural course to be adopted, if he merely wished to withdraw his claim in favour of *Melling*. What motive could he have to favour *Melling*? Why should he prefer *Melling* to himself? He might wish to prefer *Evers*, for he might think that it would enable *Evers* to pay to him the 113*l.* which then remained due, and which, it should be observed, exceeded the value of the oatmeal. It therefore seems to me that the condition in the promise of the defendant was not in terms complied with. Nor was it complied with in substance, because *Haigh* had the property to cover a debt of 700*l.* and *Melling* was, at all events, only to have it when that debt was satisfied. It therefore seems to me, in this case, that the circumstances which were necessary to vest the property in *Melling*, did not take place. The mere order of *Evers* did not vest the property in *Melling*, at least without the assent of *Kelshaw*; and we must look to the terms in which such assent was expressed. The terms upon which the assent, if any, was given, were not carried into effect, and therefore the rule for the non-suit must be made absolute.

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GARROW, B.—Upon the occasion in question *Kelshaw* did not bind himself, as contended, to the delivery of the oatmeal, but expressly distinguished that from the other property mentioned in the delivery order.

VAUGHAN, B.—This is an action of trover, in which it is necessary for the plaintiff to prove a property in his testator, and a conversion by the defendant. I think that he

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made out neither; but my judgment proceeds upon the ground that no property was proved to have vested in *Melling*. It appeared that *Evers*, being indebted to *Haigh* in 700*l.*, gave him an order on *Kelshaw*, a wharfinger, for the delivery of the oatmeal in question. On the receipt of that order, and the acceptance by the wharfinger, the property was transferred and vested in *Haigh*. Afterwards *Melling*, having a claim to a larger amount upon *Evers*, prevailed upon him to give him also a delivery order for the oatmeal and other things. This order was carried to *Kelshaw*, who, as to the other property, assented to hold it for *Melling*, but as to the oatmeal, he said, in effect, that he could not hold it for *Melling*, except subject to the claim of *Haigh*. Afterwards, *Haigh's* debt being reduced to 113*l.*, he, by another order, re-transferred the property vested in him to *Evers*. *Kelshaw* accepted this order. *Kelshaw* had said, I cannot transfer without an order from *Haigh*; get an order from him, and I will. No such order was ever got from *Haigh*, but, on the contrary, he gave an order in favour of *Evers*. Was then the condition ever complied with? Clearly not. *Melling* never could have a right till the debt of *Haigh* was extinguished. That debt never was extinguished. The property was in *Haigh*, and afterwards revested in *Evers*, and never was in *Melling*.

BOLLAND, B.—I at first entertained very considerable doubts on this subject, but after having heard the argument, I agree with the rest of the Court in thinking that this rule should be made absolute. The question is, whether there was such a property in *Melling*, as that trover could be maintained upon it. There is one part of the evidence from which it appeared that the defendant had promised not to part with the goods without letting *Melling* know. In this form of action, however, we are only to look whether there was property in *Melling*. The

facts, as to the question of property, were, that *Melling* and *Haigh* having respectively claims upon *Evers*, *Haigh* was successful in getting priority of security upon the goods in question. He then went and lodged the delivery order, which he obtained, with *Kelshaw*, the wharfinger, who accepted the same, and the right of property became thereby vested in *Haigh*. It is hardly contended, that, before the 1st of September, any property was in *Melling*. Till that time, it was clearly in *Haigh*, and his debt not being liquidated, he had a right to transfer it to a stranger, and what difference can it make that he transferred it to *Evers*. It was urged for the plaintiff, that the transfer from *Evers* to *Haigh* was fraudulent. There is nothing on the report to lead to the supposition that any fraud was intended. The inference is the other way. If *Haigh's* debt had been satisfied, there might have been a pretence for supposing the transfer fraudulent; but when it is considered that he had a claim upon the property to more than its value, there could be no fraudulent motive in him. The motive in his mind would probably be, the intention of getting his debt paid; for the property being under a cloud, he might probably suppose that it would be better disposed of by investing *Evers* with the legal right to it.

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Rule absolute.

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[In Error from the Court of *King's Bench*.]

By a charter-party, which was found to be executed *bond fide*, the owners of a ship appointed A. to the command of the ship, on a voyage from London to Calcutta, and back. A. was to load the ship out and home, and on intermediate voyages at his option during a limited period, and was to pay to the owners a monthly freight, payable as specified, and the balance of such monthly freight was to be secured to the owners by the freight bills for the freight of the homeward cargo from Calcutta being made payable to joint trustees for the owners and A., who were, out of the proceeds of such freight bills, to pay the balance of the monthly freight to the owners, and then to pay the surplus to A. An agent

CASE against the defendants below as ship-owners, for the loss of goods shipped by the plaintiffs below, in *India*, to be conveyed to *London*. The first count of the declaration stated, that the defendants below were owners of a certain ship or vessel called the *Benson*, whereof one *George Betham* then was master, and which said ship or vessel was then riding at anchor in parts beyond the seas, to wit, in the river *Hooghly*, in the *East Indies*, and bound on a voyage from thence to the port of *London*, to wit, &c. And that the defendants below, so being owners of the said ship or vessel as aforesaid, the plaintiffs below heretofore, to wit, on &c., in parts beyond the seas, to wit, in the river *Hooghly* aforesaid, shipped and loaded, and caused to be shipped and loaded, in and on board of the said ship or vessel, whereof the said *George Betham* then was master, and which said ship or vessel was then riding at anchor in the river *Hooghly* aforesaid, divers goods and merchandizes, to wit, &c., being in good order, &c., and of a large value, &c., to be taken care of, carried, and conveyed in and on board of the said ship or vessel, from the river *Hooghly* aforesaid, to the port of *London* aforesaid, and there, to wit, at the port of *London* aforesaid, to be safely and securely delivered in the like good order, and well conditioned, to certain persons, commonly called and known by the names, and using the stile and firm, of Messieurs *Bazett, Farqu-*

of the owners was to go on board to superintend the management of the stores, with power to displace A. and to appoint another commander in case of his breaking the agreement on his part. *C. & Co. of Calcutta*, having knowledge of this instrument, shipped goods by the vessel at *Calcutta* for *London*, and drew freight bills for the amount of the freight in favour of the trustees. The goods so shipped were never delivered:—*Held*, that the absolute owners were not liable to the shippers for the non-delivery.

har, Crawford, & Co., or to their assigns, (the act of God &c. excepted), for certain freight and reward, payable by bills in that behalf. And although the said goods and merchandizes were then and there had and received by the said *George Betham*, so being master of the said ship or vessel as aforesaid, in and on board of the said ship or vessel, in the river *Hooghly* aforesaid, to be carried, conveyed, and delivered as aforesaid.—Yet the said defendants below, so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving, &c., did not nor would take care of, and safely and securely carry or convey, the said goods and merchandizes, or cause the same to be carried and conveyed in or on board of the said ship or vessel, or otherwise, from the river *Hooghly* aforesaid, to the port of *London* aforesaid, nor there, to wit, at the port of *London* aforesaid, safely and securely deliver the same, or cause the same to be delivered to the said Messrs. *Bazett, Farquhar, Crawford, & Co.*, or to their assigns, (although the said defendants below were not prevented from so doing by the act of God, &c.), but, on the contrary thereof, the defendants below, so being owners of the said ship or vessel as aforesaid, so improperly behaved and conducted themselves with respect to the said goods and merchandizes, that by and through the mere carelessness, negligence, misconduct, and default of the said defendants below, and their servants in this behalf, a great part of the said goods and merchandizes, being of great value, &c., became and was wholly lost to the plaintiffs below, and also thereby the residue of the said goods and merchandizes, being of great value, to wit, &c., became and was greatly damaged, &c. &c. (a).

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At the trial before Lord *Tenterden*, at the *London Sit-*

(a) There were other special counts in the declaration, as to which the jury were, by consent, discharged from giving a verdict.

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tings after *Michaelmas Term*, 1826, the Jury found a special verdict on the first count of the declaration, to the following effect:—On the 11th *March*, 1817, the plaintiffs below shipped on board the ship *Benson*, near *Calcutta*, in the *East Indies*, then riding at anchor in the river *Hooghly*, therein mentioned, two thousand one hundred and seventy-one bags of sugar, and one hundred and ninety-one chests of indigo, then being in good order and well conditioned, for which the following bill of lading was signed by *George Betham*, then being the master of the said ship, under the circumstances thereafter mentioned, “Shipped by the grace of God in good order and well conditioned by Messrs. *Colvins, Bazett, & Co.*, in and upon the good ship called the *Benson*, whereof is master under God for this present voyage *George Betham*, and now riding at anchor in the river *Hooghly*, and by God’s grace bound for *London*, to say two thousand one hundred and seventy-one bags of sugar, and one hundred and ninety-one chests of indigo, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of *London*, (the act of God, the King’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, excepted) unto Messrs. *Bazett, Farquhar, Crawford & Company*, or to their assignees, freight for the said goods being paid by bills. In witness whereof the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which four bills being accomplished, the other three to stand void. Dated in *Calcutta*, 11th *March*, 1817, *George Betham*.”—The said *George Betham* received the said goods on board the said ship, in the said river *Hooghly*, to be carried and conveyed according to the said bill of lading; and at the time of the said goods being so shipped and received, and the said bill of lading signed, and before that time, the defendants

below were the owners of the said ship; and before the said ship sailed to the *East Indies*, and whilst they were such owners, the following charterparty, bearing date the 7th June, 1816, was executed by the defendant below, *Thomas Starling Benson*, who was then the managing owner of the said ship, and acting on behalf of himself and the other part-owner of the said ship on the one part, and *George Betham* of the other part, for the said ship *Benson*. This charterparty of affreightment, made and concluded in *London*, 7th June, 1816, between *Thomas Starling Benson*, Esquire, of the city of *London*, part owner of the good ship or vessel called the *Benson*, of five hundred and seventy-three tons admeasurement or thereabouts, now lying in the port of *London*, of the one part; and *George Betham*, of the city of *London*, merchant and mariner freighter of the said ship, of the other part; witnesseth, that the said owner, for the considerations thereafter mentioned, doth hereby promise and agree to and with the said *George Betham*, his executors, administrators, and assigns, that he the said *George Betham* shall have, and he is hereby accordingly appointed to, the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso or condition hereinafter contained respecting the appointment of an agent on board the said ship, on the part of the said owner; and the said ship being tight, staunch, and substantial, and every way properly fitted, victualled, and provided, as is usual for vessels in merchants' service, and for the voyage and service hereinafter mentioned, and being also manned with thirty-five men and boys (the said commander included), he the said *George Betham* shall be at liberty, and he is hereby allowed and permitted, to receive, take, and load on board the said ship, in the port of *London*, all such lawful goods, wares, or merchandizes as he may think proper to ship, (not exceeding in the whole what the said ship can reasonably stow and carry, over and above her stores, tackle, apparel, and

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provisions, and reserving sufficient room in the said ship for one hundred tons of goods, to be laden by or for account of the said owners as hereinafter is mentioned; and the said ship being so laden, he the said *George Betham* shall and will set sail therewith, and proceed to *Calcutta* in the *East Indies*, with liberty to touch at *Madeira* and *Madras* in her outward passage), and being arrived at *Calcutta* aforesaid shall and will unload the said outward cargo, and reload the said ship with a cargo of *East India* produce, and return with the same to the port of *London*; and, upon her arrival there, and being finally discharged of her cargo, and being cleared by the revenue officers, the said intended voyage and service is to end and be completed, (the act of God, the King's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, excepted): and the said owner doth hereby further promise and agree to and with the said *George Betham*, his executors, administrators, and assigns, that in case any of the aforesaid complement of thirty-five men and boys shall, happen to die, or desert or leave the said ship during her said intended voyage or service, so that the number shall be reduced below thirty-two, that then, and in every such event happening, the aforesaid number of thirty-two shall, if practicable, be kept and made up at the expense of the said owner: and further, that the said ship shall at all times during her said intended voyage and service, be furnished and provided with proper and sufficient stores, provisions, and other necessary articles; and that the said ship shall, if required, be kept and continued in the service aforesaid, for and during the term or space of twelve calendar months, to be accounted from the twelfth day of the present month of June, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the port of *London*, being finally discharged of her homeward cargo and cleared by

the revenue officers: and the said owner doth also promise and agree that the said ship shall, previous to her departure from the port of *London*, on her above-mentioned voyage, be furnished and provided with good water casks capable of containing eighteen tons of water; and the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions; for which the said freighter is to pay or allow unto the said owner, his executors, or administrators, at and after the rate of 14*d.* for every passenger or servant, *per* lunar month, and so in proportion for a less period. In consideration whereof and of every thing above mentioned, the said *George Betham* doth hereby promise and agree to and with the said *Thomas Starling Benson*, his executors, administrators, and assigns, in manner and form following, that is to say, that he the said *George Betham* shall and will take upon himself the command of the said ship, for and during her said intended voyage, and until her return to the port of *London*, and shall and will navigate her to the best and utmost of his skill and ability; and also that he the said *George Betham*, his executors, administrators, or assigns, shall and will accept, receive, and take the said ship into his or their service, for and during the term or space of twelve calendar months certain, to commence and be accounted from the twelfth day of the present month of *June*, and for and during such longer time or term (if any) as may be necessary to complete her said intended voyage, and until her return to and final discharge and clearance in the port of *London*, as aforesaid: and further, that he the said *George Betham*, his executors, or administrators, shall and will well and truly pay, or cause to be paid unto the said owner, his executors, administrators, or assigns, freight for the use or hire of the said ship, at and after the rate of 25*s.* *per* ton, register measurement of the said ship *per* calendar month, for and during the aforesaid term of twelve calendar months certain, and for

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and during such longer time or term (if any), as may be necessary to complete her said intended voyage, and until her return to the port of *London*, and being finally discharged of her homeward cargo and cleared by the revenue officers, or up to the day of the date of her being lost, captured, or last seen or heard of; such freight to be paid in manner following, that is to say, the sum of 1,000*l.* part thereof, at or before the execution of these presents, the sum of 2,000*l.*, further part thereof, by approved bill or bills, to be drawn in *London* upon *Calcutta*, in favour of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof, at two calendar months next after the said ship shall arrive at *Calcutta* aforesaid, and the residue and remainder of such freight to be paid or secured to the satisfaction of the said owner, his executors, administrators, or assigns, upon the arrival of the said ship in the port of *London*, and previous to commencing the discharge of her homeward cargo. Provided always, that in case the said ship shall be kept or detained at *Calcutta* aforesaid more than ninety days, then and in such case the said *George Betham* do hereby engage to pay, or cause to be paid, at *Calcutta* aforesaid, to the agent of the said owner, the sum of 1,000*l.*, either in cash, or by bills to be approved of by such agent, in part payment of the balance of freight which may become due under and by virtue of this charterparty; and the further sum of 1,000*l.* at the expiration of every sixty days after the said ninety days, which the said ship may expend or lay at *Calcutta* aforesaid. And it is hereby declared and agreed by and between the said parties, that bills remitted from *India* in manner hereinafter expressed, shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due, under and by virtue of these presents, as hereinbefore mentioned. And the said *George Betham* doth hereby especially promise and agree,

that all and every the bills of exchange which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to, or to the order of, Messrs. *Buckles, Bagster, & Buchanan*, of the city of *London*, merchants, or indorsed over to them, and delivered to the said owner's agent, to be by him remitted to the said *Buckles, Bagster, & Buchanan*, in *London*; who, it is hereby especially agreed by and between the said parties, are to receive the amount thereof as joint trustees for the said owner and the said *George Betham*, he, the said *George Betham*, hereby authorizing and empowering them to appropriate the proceeds of such bills of exchange in or towards payment to the said owner, his executors, administrators, or assigns, of the balance of freight which may be or become due to him or them, under or by virtue of these presents; and the residue, if any, to the said *George Betham*, his executors or administrators. And the said *George Betham* doth hereby further promise and agree to furnish and provide, at his own expense, sufficient provision and water, and also all other necessities, for the use of the passengers on board the said ship. And that he, the said *George Betham* shall and will pay for all provisions belonging to the owners of the said ship, which shall be issued for the use of or consumed by any of the passengers during the said voyage, an account of the same being rendered to him once a-week by the said owner's agent, or by the steward on board the ship; and further, that all expenses of bulk heads, cabins, and other accommodations for passengers, shall be paid by him, the said *George Betham*, the materials for which are to be left on board the said ship at the termination of the said voyage, and become the property of the said owner, except the hearth and three foremost water-closets put up by the said freighter, which he is to be at liberty to take away, putting the said ship in the said state as she was before such hearth and water-closets were put up. And the said

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George Betham doth also agree to pay and defray all port charges and pilotage which may be incurred by the said ship during her said intended service, save and except such as may be incurred in the port of *London* outward and homeward bound, and once at *Calcutta*. And the said *George Betham* doth hereby further agree, that the said owner shall have the liberty of shipping on board the said ship outward bound, freight free, any quantity of iron, vinegar, and mustard, he may think fit, not exceeding in the whole 100 tons, to be delivered at *Calcutta*. Provided always, and it is hereby expressly agreed and understood by and between the said parties to these presents, and particularly by the said *George Betham*, that an agent be put on board the said ship by the said owner, for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship, at least six feet square, for his sole use, and to mess at the said *George Betham's* table; which agent is to have the sole management, direction, and superintendence of the said ship's stores and provisions, and the issuing and delivering out of the same for and during the said intended voyage. And such agent is likewise to have the sole ordering and purchasing of any supplies, stores, provisions, and other articles, which may be required for the use of the said ship during her said voyage; and that all bills which may be required to be drawn upon the owners of the said ship for any such supplies, or otherwise, on account of the said ship, shall be drawn by such agent only; and the said *George Betham* doth hereby expressly engage that he will not at any time or times during the said voyage, or during the time he may be in command of the said ship, interfere with or issue any stores, provisions, or other articles, on board the said ship, or purchase any provisions, stores, or other articles, for the use of the said ship, (except only such as may be requisite for the passengers, and for the said freighter's servants, and for which

he will pay out of his own proper money). And likewise that he, the said *George Betham*, shall not, nor will, at any time or times, draw any bill or bills upon the owners of the said ship, any or either of them, for any provisions or other articles supplied for the said ship, or for any other purpose whatsoever: provided also, and it is hereby further agreed by and between the said parties, and especially by the said owner, that the said freighter shall have the liberty and privilege of employing the said ship in the *East Indies*, for any intermediate voyage or voyages he may think fit, without prejudice to this charterparty, but not exceeding in the whole the time or term of twelve calendar months, to be computed from and after the expiration of thirty days next after the arrival of the said ship at *Calcutta* aforesaid, upon his, the said *George Betham*, his executors, or administrators, paying or causing to be paid to the said owner, his executors, administrators, or assigns, the same rate of freight as is hereinbefore stipulated, *viz.* 25s. *per* ton, *per* month, for all such additional time as the said ship may be employed or detained in *India*, such additional freight being paid to the said owner's agent for the time being, or secured to his satisfaction, previous to the said ship entering or proceeding on such additional voyage or service: and it is hereby expressly provided and declared, that in case the said *George Betham* shall proceed with the said ship to any port or place other than *Madeira*, *Madras*, and *Calcutta* aforesaid, without the special leave in writing of the agent of the said owner for the time being, or if the said *George Betham* shall be guilty of a breach of any or either of the promises and agreements herein contained on his part; then and in any such case the said *George Betham* shall be and become divested of any further command of or in the said ship: and it shall thereupon be lawful for the said owner's agent for the time being, to appoint another commander for the said ship, in lieu and

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stead of the said *George Betham*; and it is hereby further expressly provided and declared, that in case the said ship shall be kept or detained at *Calcutta* beyond the ninety days hereinbefore mentioned, or if in that event the said *George Betham* shall make default in payment of any or either of the sums of 1,000*l.* hereinbefore engaged to be paid at that place to the agent of the said owner, in part discharge of the balance of the freight to become due under and by virtue of this charterparty, it shall thereupon be lawful for the said owners' agent to load the said ship with a cargo for *England*, on the said owner's account, without prejudice, however, to this charterparty, or to any claim which the said owner, his executors, or administrators, may have against the said *George Betham*, his executors, or administrators, for freight, dead freight, or otherwise, on account thereof. The Jury further found, that this charterparty was made and executed *bonâ fide*. That, on the 25th *July*, 1816, the following memorandum was signed and agreed to by the said defendant below, *Thomas Starling Benson*, and the said *George Betham*. "Conditions agreed between *Thomas Starling Benson*, Esquire, owner, and *George Betham*, Esquire, commander of the ship *Benson*, on a voyage to *India*;—Wages 10*l.*, say 10*l.* *per* month, no primage or privilege of tonnage whatever;—Cabin allowance for voyage, (it being understood that the agent, chief and second mates, and surgeon, if any, mess in cabin), 150*l.* owner providing nothing;—Allowance while in *India*, three *sicca rupees per* day." That one *Samuel Oviatt* went as agent on board the said ship *Benson*, under the said charterparty, on the said voyage, and carried out letters of introduction from the said persons using the said firm of *Buckles, Bagster, & Buchanan*, being merchants in *London*, on behalf of the said defendants below, to the said plaintiffs below, by which he was directed to apply to them in case of necessity; and he did apply to them, and they acted as agents at

Calcutta, both for the said defendants below and *George Betham*, as thereafter mentioned; that *Samuel Oviatt*, acted under a power of attorney, executed by the defendant below, *Thomas Starling Benson*, by which, after reciting the charterparty at length, *Oviatt* was authorized to do for the owners all those things which, by the charterparty, the agent of the owners was to have the power of doing. That the said *Samuel Oviatt* carried out with him the said charterparty, and communicated it to the said plaintiffs below, as soon as he arrived in *Calcutta*, and before the shipping of the said goods; and the said plaintiffs below, before that time, read the said charterparty, and received a copy thereof; and that for freight of the said quantity of sugar and indigo, in the said bill of lading mentioned, the said plaintiffs below drew bills upon certain other persons, payable sixty days after the said ship *Benson's* arrival in *London*, to the order of the said persons using the firm of *Buckles, Bagster, & Buchanan*, which bills they delivered to the said *Samuel Oviatt*, to be remitted to the said last-mentioned persons, pursuant to the stipulations in the said charterparty, and the said bills were so remitted. That the said *George Betham* employed the said plaintiffs below as his agents at *Calcutta*, who accordingly acted as his agents, and collected and paid over to him the freight of the goods carried in the said ship, in the said voyage from *London* to *Calcutta*, and procured freight for him on the said voyage from *Calcutta* to *London*, and they had a commission from him for procuring such freight. That the said ship sailed on her said voyage from the river *Hooghly* to *London*, with the said quantity of sugar and indigo on board, but that the quantities of sugar and indigo never were delivered to the said plaintiffs below, or their assigns, pursuant to the said bill of lading, although no act of God, &c., prevented the same from being so delivered; but, on the contrary thereof,

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part thereof was lost, &c., and the residue lessened in value, &c.

Upon this special verdict the Court of *King's Bench* gave judgment for the plaintiffs below (a). A writ of error was afterwards brought, and the case was argued by—

Campbell for the plaintiffs in error.—The question in this case is, whether the defendants below were liable to be sued as carriers of the goods shipped. The action is founded on a contract, and it is quite immaterial whether it be shaped in *tort* or *assumpsit* (b). In either case the same proof of a contract is requisite. Then the question arises, with whom did the plaintiffs below contract. The plaintiffs in error contend, that *Betham* alone promised. It is said, on the other side, that the defendants below promised. It may be conceded, that if a ship owner send out a person as his captain or agent, no *secret* agreement will discharge the owner's liability on the contracts which such person may enter into as captain or agent. If such had been the case here, the captain would have been held out as the agent of the owners. But the presumption, arising *prima facie*, may surely be rebutted. If the ship be freighted to the master, and that fact be made known to the shippers, they know that the master is the carrier. The goods were not shipped for the benefit of the owners, who were to receive the same freight, namely, the monthly hire, whether a single bale of goods was shipped or not. The plaintiffs below clearly then contracted with *Betham*, for they knew that he had contracted to pay the monthly freight, and that their goods were shipped on freight, not for the benefit of the defendants below, but of *Betham*. The carrier must surely be the person who is to have the

(a) 8 B. & C. 166 ; 2 M. & R. 47.

(b) *Marzetti v. Williams*, (K. B.) Hilary Term, 1 Will. 4.

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benefit of the freight, and who has the control of the vessel during the voyage. Laying aside the fact that *Betham* was the captain, suppose that this was the common case of a ship under a charter to a freighter, put up by him as a general ship. It is clear that the freighter and owner *pro hac vice* is to be considered as the carrier, and that he, and he alone, contracts with the shipper, and is responsible to him. *Parish v. Crawford*(a) is the only case which can lead to a different conclusion; that was merely a *Nisi Prius* decision, and there are numerous authorities the other way. In *Annett v. Carstairs*(b), the master appointed by the mortgagor of a ship, brought an action for his wages against the mortgagees. It was held, that he could not recover; and Lord *Ellenborough* said—"Title has nothing to do with these cases. We must look to the contract between the parties." So, in the present case, the title to the vessel has nothing to do with the question of who is the carrier. At all events, the title can only raise the presumption, which may be rebutted, and the contract may be proved to have been with another. If, in *Parish v. Crawford*, the facts were, that the plaintiff was ignorant of the arrangement entered into between the absolute owner and the owner *pro hac vice*, that case might possibly be supported; but where the shipper knows of the charter, he must be held to contract with the owner *pro hac vice*. There is the authority of Lord *Tenterden*(c) for saying, that *Parish v. Crawford* is not to be considered as law. It is overruled, also, by the subsequent cases of *James v. Jones*(d), and *Mackenzie v. Rowe*(e). The last-mentioned case decided, that the ship being let to freight, the freighters were the owners with respect to the shippers, and that the general owners were not liable. *Vallejo v. Wheeler*(f),

(a) Abb. on Shipping, 19.

(b) 3 Camp. 354.

(c) Abb. on Shipping, 22.

(d) Id. 20.

(e) 2 Camp. 482.

(f) Cowper, 143.

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and *Soares v. Thornton (a)*, which are cases as to bar-
ratry, are in conformity with these later decisions.

It remains to be shewn, that the instrument in question was a charterparty. What is there to prevent *Betham* being the charterer? It may be conceded, that the Jury might have found the transaction to be a contrivance and a collusive arrangement, whereby the owners were trying to avoid their responsibility. But the Jury have expressly found, that the transaction was *bond fide*. The meaning of a charterparty is, that the owner enters into an agreement with an individual, that such individual may have the use of the ship, and may put her up as a general ship, so that the sum to be received by the owner of the ship shall not depend on the profits to be made by the ship, but that, independently of the employment of the ship, the general owner is secure. Now, in the present case, *Betham* was to take out what goods he chose, and he was at liberty to send the vessel from *Calcutta* on intermediate voyages, for a certain period. Then he was to bring her to *London*, and to pay the residue of the monthly freight to the defendants below, on arrival. This was surely a charterparty, and it lies on the other side to shew that this was not a charter.

It is objected that there are no words of demise. This is quite immaterial.

[*Tindal*, C. J.—Here are the words, for the use or hire of the said ship].

Even in the case of land, the word demise need not be used. If the party is to take the profits, it amounts to a demise in law. So, any words, which shew that the party is to have the use of the vessel, amount to a charterparty. The reservation of certain room to the owners, shews, that, without such reservation, the use of the entire vessel would have passed.

(a) 7 Taunt. 627.

Another objection is, that the defendants below appointed the master and crew. That is the almost universal practice where a ship is let to hire. When the voyage begins, they become the servants of the freighter, and cease to be the agents of the absolute owner.

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No reliance can be placed on the circumstance of *Betham's* being the master, or it would be necessary to go the length of holding, that the master could never be the freighter. The master, in such case, is *prima facie* the agent of the owner; but if the shipper knows that he is the freighter, he contracts with him, not as master and agent of the owner, but as carrier. In such case, he ceases to be the agent of the owner, and he is no longer liable to the owner's control.

The circumstance of a third person going out in the ship as an agent for the owners, will also be relied on; but neither he, nor the owners themselves if present, could have interfered, especially with relation to the taking on board goods. That person merely went to do what the owners could have done if present—as, to take advantage of the clause for re-entry if the charter should be broken, and to superintend the stores and provisions.

But the other side will chiefly rely, as they did in the Court below, on the arrangement which was entered into as to the freight bills. The bills for the homeward freight were to be remitted to a house in *London*, to be held by them as trustees, first to secure the freight due to the defendants below, and then to pay the residue to *Betham*. This arrangement is merely a security, and cannot prevent the instrument from being a charterparty, any more than if the freight in question had been to be secured by freight-bills, for goods carried in another ship, of which *Betham* had been actual owner. It might, indeed, with the other facts of the case, have been *evidence* of collusion; but the Jury have distinctly negated that view of the case.

The Court below do not appear to have adverted sufficiently to the fact of the *bona fides* being found by the

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Too much reliance also was placed by them on the supposition, that the contract in question was contrary to public policy. The argument proceeding on the ground of public policy has been well compared to an unruly horse. It is much safer to abide, as nearly as possible, by the contract of the parties. It ought to be shewn by the other side, very clearly, that such a contract is illegal and mischievous, before the Court can proceed on that ground, to hold parties bound by a contract, which is in reality entered into between other persons.

But there are material allegations in this declaration, which were not proved. The allegation, that the goods were to be carried for *certain freight and reward, payable in bills in that behalf*, is not true. That allegation must mean payable to the defendants below; and if there had been a demurrer on the ground of the declaration not having stated to whom the freight was to be payable, the declaration would have been supported upon the ground that it had such meaning. If it had not that meaning, it would be bad. That allegation, then, is untrue, and is contradicted by the finding; for the freight was to be paid to *Betham*, and not to the defendants below. The bills were to be paid for *Betham's* profit or loss. No duty then arises as against the defendants below. The allegation, that the goods were *received by Betham so being such master*, is also untrue. That is substantially an averment, that *Betham* received them as master; which was not the case, for the shippers had a copy of the charter, and knew that the goods were delivered to *Betham*, not as master, but as freighter of the vessel. The allegation, that the defendants below misconducted themselves, is also untrue, and is negatived by the facts which shew that it was *Betham* who misconducted himself.

Suppose that a party abroad, having read this charter, had shipped goods on an intermediate voyage allowed by

the charter, would it be contended, that such shipper would have had a remedy against the owners for the non-delivery of such goods? There would have been nothing, to distinguish that case from *James v. Jones*, for the objection on the freight bills would not have been applicable. Can it then be said, that *Betham* was to be the freighter of this vessel on such intermediate, or on the outward, voyage, and not on the homeward?

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Betham might clearly have been sued by the plaintiffs below, as carrier and freighter, without calling him master, for he contracted with them in respect of reward for his own benefit. Can such shippers, then, with full knowledge of the charter, have an election to sue either at their option? They could, unquestionably, sue *Betham* as owner *pro hac vice*. There is no instance of such option in the law of England. Where you contract with a principal, knowing him, you cannot sue another.

Again, could the defendants below have sued the plaintiffs below for freight? Clearly not; for there was no privity between them. The remedy of the owners was against *Betham*, and against *Betham* alone, on the charter. The remedies in such case must be reciprocal. In every point of view, the contract appears to have been made with *Betham*, and he alone was responsible to the plaintiffs below.

F. Pollock for the defendants in error.—The question, in this case, lies in a very narrow compass, and depends on the legal effect of this instrument, which is called a charterparty. The Court will look at all its parts, and see what is the legal result of such a contract between the owners and master. That result will be the same, whether the shippers had knowledge of the contract or no; at least, if the legal effect of the instrument be what was attributed to it by the Court of *King's Bench*, such knowledge could not give it a different effect.

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It is said, on the other side, that the question is merely with whom the contract was made. That, however, is not the touchstone here, for that question depends on another, and must turn upon the character which the master filled, in other words, upon the effect of the instrument. All those arguments relied on by the other side, as to certain material allegations in the declaration not being proved, are only different modes of putting the same question. Those allegations are certainly not made out, if there was no contract in point of law with the owners. If *Betham* was their agent in the transaction, the freight was payable to them; *Betham* delivered the goods for them as their captain, and they misconducted themselves through their agent, according to the different allegations alluded to.

But it was said, that the Court below did not pay sufficient attention to the fact of the Jury having found the *bona fides* of this transaction. Nothing turns upon that finding. *Bona fides*, 'as explained by Lord Tenterden, in a case where a purchase before a bankruptcy was attempted to be impeached on the ground of its not being *bona fide*, means this, that a transaction should be what it professes to be, as a sale where it professes to be a sale, or a pledge where it professes to be a pledge, and not a pledge where it professes to be a sale, or *vice versa*.

In the present case, it may be admitted, that the parties intended all the provisions of the instrument in question to be carried into effect.

The knowledge which the shippers received of the instrument in question, was not imparted to them, lest they should be deceived by supposing that they were contracting with the general owners; but it was given to them with quite a different object, namely, lest they should be deceived in supposing that they had a right to pay *Betham*, the master, and it was in effect a notice to them, that the owners had a right to the freight, and that, if they paid any body else, they would make such payment in their own wrong.

The question is not, whether *Parish v. Crawford* is or is not good law, but whether this is a real charterparty, or is only a peculiar mode of appointing a master under certain restrictions. If the former be the case, the defendants in error are out of Court; if the latter, they are entitled to the judgment of the Court.

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If *Betham* remained under the control of the owners, and of *Oviatt*, their agent, sent to control him—if he continued substantially their servant,—if in the result they were still the owners, and he the master of the vessel, then, although this instrument may have been honestly intended to secure to the owners the benefit which they contracted for, they cannot by such instrument, with whatever degree of good faith it may have been executed, divest themselves of the liability thrown upon them by law. Though the instrument be called a charterparty, there is no magic in the word, but the Court must look to its provisions.

The instrument begins with stating, that the owners promise and agree with *Betham*, that he shall have, and he is thereby accordingly *appointed to, the command of the said ship*, subject to certain restrictions.

Here are no words of demise, and though it is not necessary to carry the argument to the length of contending that such words would be necessary to the case of the plaintiffs in error, still it is important to observe, that the instrument in question does not profess to part with any interest in the vessel.

It was well remarked in the argument below, that the first clause was the key to and explained the whole instrument. Has this clause the aspect of intending to constitute *Betham* the owner *pro hac vice*?

Then the owners are to receive, through the medium of a trustee for them, all the freight. They might be endeavouring, by this arrangement, to shield themselves from their liability; but the question is, whether they have succeeded in altering the relation of owners and master.

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Then *Betham* promises, not that he will hire the ship, but that he will take the command of her.

Then comes the appointment of *Oviatt*, as agent to the owners, to superintend the stores and provisions, and these were to be provided at the owners' expense.

The memorandum between the defendants below, as owners, and *Betham*, as master, was executed after the time when the former are supposed to have parted with their ownership to *Betham*.

Then comes the power of attorney, which was given to the agent who went on board to superintend for the owners.

What then is the effect of this instrument? Is it a peculiar mode of appointing the master, or is it an actual parting with the interest in the vessel *pro hac vice*, so as that the shippers must be taken to have contracted with the charterer *pro hac vice*. If the intention be doubtful, or if the instrument contain two inconsistent intentions, the argument of public policy ought certainly to have considerable weight. Many cases may be put where the provisions intended by the parties cannot be carried into effect. Thus, if an estate in fee be given, conditions inconsistent with the rights of tenants in fee would not be carried into effect. Suppose an instrument, framed to give one of two partners a share of the profits, and no liability in case of loss. Such party would be clearly liable to a third person, even if such third person knew of the arrangement; the effect of such an instrument would be, to make him a partner with the usual liabilities. He could not shield himself from such responsibility, because the right to receive the profits places him in the situation of a partner. The same rule applies to ship-owners. They are liable, because they appoint the master and receive the freight. *Boucher v. Lawson*(a). The tests mentioned in that case apply here. It is said, that *Betham* was owner *pro hac vice*. Who then was

(a) Cas. temp. Hardw. 85. 194.

captain? Was *Betham* his own captain? He is treated by the instrument as the owners' captain. Suppose *Betham* had been discharged under the provisions of this charterparty before he reached *Calcutta*, and *Oviatt* had taken another captain, and they had received goods on board, whom would the new captain have bound by his signature to a bill of lading? Could it be said, that, in such case, *Betham* would have been bound?

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[*Tindal*, C. J.—*Betham*, in that case, might still have loaded the vessel.]

Suppose *Betham* had not interfered in such loading, but the shippers had taken bills of lading, signed by such new captain, the argument on the other side must go the length of contending, that *Betham* alone would have been liable.

Examining this contract by every test, it seems not to be a contract by which any right, interest, or property in the vessel was intended to pass; but a mere agreement, by which *Betham* was to have the command, partly for the benefit of the owners, and partly for his own benefit. Such an agreement cannot bind third parties, so as to relieve the owners from their responsibility, and the knowledge of it by such third parties cannot vary its legal effect.

Campbell in reply.—To constitute a freighter, it is not necessary that he should have the entire and absolute possession of the hull, and the appointment of the master and crew. That is not usually the case in contracts of affreightment in this country. In *Saville v. Campion* (a), and *Tate v. Meek* (b), although there was a clear freighting, it was still held, that the absolute owners were so far in possession, as to have a lien for the freight under the charter. The words and provisions of the present charter will be found to be nearly similar to those in ordinary use.

(a) 2 B. & A. 503.

(b) 8 Taunt. 280.

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and *Soares v. Thornton* (a), which are cases as to bar-
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It remains to be shewn, that the instrument in question was a charterparty. What is there to prevent *Betham* being the charterer? It may be conceded, that the Jury might have found the transaction to be a contrivance and a collusive arrangement, whereby the owners were trying to avoid their responsibility. But the Jury have expressly found, that the transaction was *bond fide*. The meaning of a charterparty is, that the owner enters into an agreement with an individual, that such individual may have the use of the ship, and may put her up as a general ship, so that the sum to be received by the owner of the ship shall not depend on the profits to be made by the ship, but that, independently of the employment of the ship, the general owner is secure. Now, in the present case, *Betham* was to take out what goods he chose, and he was at liberty to send the vessel from *Calcutta* on intermediate voyages, for a certain period. Then he was to bring her to *London*, and to pay the residue of the monthly freight to the defendants below, on arrival. This was surely a charterparty, and it lies on the other side to shew that this was not a charter.

It is objected that there are no words of demise. This is quite immaterial.

[*Tindal, C. J.*—Here are the words, for the use or hire of the said ship].

Even in the case of land, the word demise need not be used. If the party is to take the profits, it amounts to a demise in law. So, any words, which shew that the party is to have the use of the vessel, amount to a charterparty. The reservation of certain room to the owners, shews, that, without such reservation, the use of the entire vessel would have passed.

(a) 7 Taunt. 627.

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The circumstance of a third person going out in the ship as an agent for the owners, will also be relied on; but neither he, nor the owners themselves if present, could have interfered, especially with relation to the taking on board goods. That person merely went to do what the owners could have done if present—as, to take advantage of the clause for re-entry if the charter should be broken, and to superintend the stores and provisions.

But the other side will chiefly rely, as they did in the Court below, on the arrangement which was entered into as to the freight bills. The bills for the homeward freight were to be remitted to a house in *London*, to be held by them as trustees, first to secure the freight due to the defendants below, and then to pay the residue to *Betham*. This arrangement is merely a security, and cannot prevent the instrument from being a charterparty, any more than if the freight in question had been to be secured by freight bills, for goods carried in another ship, of which *Betham* had been actual owner. It might, indeed, with the other facts of the case, have been *evidence* of collusion; but the Jury have distinctly negatived that view of the case.

The Court below do not appear to have adverted sufficiently to the fact of the *bona fides* being found by the

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dar months certain, and until her return to the port of *London*, and clearance, or up to the day of her being lost, captured, or last seen or heard of."

But it is objected by the plaintiffs below, that such contract contains no words of express demise; and undoubtedly it does not. But even in a lease of lands, no such words are absolutely necessary. "But any words which amount to a grant, are sufficient for a lease"(a). And there are cases in the books, that if a man covenants that *A.* shall have the land for a term, rendering rent, or that the covenantee shall enjoy the land(b), these words would amount to a lease. Now, the present case comes very near those referred to; for the owners do covenant, that the ship shall be kept in the service of *Betham* for a certain time; *Betham* covenants that he will receive her into his service during that time, and that he will pay for the *use or hire* of her, a certain freight. Stipulations, that appear equivalent, in their effect, to an actual demise of the ship.

But further, the whole of the ship is so far parted with, that it is thought necessary that *Betham* should covenant with the owners, that they should have liberty to load, on the outward voyage, iron and other articles, not exceeding in the whole 100 tons.

Again, the mode in which the ship was to be used, and in which the freight reserved by the charterparty is to be paid, support the same construction of the charterparty. The ship, both on her outward and homeward voyage, was to be put up by *Betham*, (in many parts of the charter called the freighter), as a general carrying ship. The freight, which the owners stipulate to receive from him, is quite independent of that which he receives for the carriage of goods; theirs is a time freight, his depends on the carriage of the goods shipped. If the ship went out

(a) Co. Litt. 45. b.

(b) R. 1 Leon. 136.

without any cargo, or was lost before her arrival at her outward or homeward port of destination, (in which cases *Betham* might receive no freight), the owners would still receive the same amount as if she had returned full, or, in case of the loss of the ship, up to the day of her loss. Under these circumstances, we think the captain, in putting up the ship as a general ship, and signing bills of lading, cannot be considered as acting as the servant or agent of the ship owners, or in any other manner than as the temporary owner of the ship.

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Three objections have been principally relied on in argument by the defendants in error. *First*, that the same person who takes the ship as freighter, was himself appointed the captain by the owners of the ship. *2ndly*, That an agent was put on board by the owners with powers inconsistent with *Betham's* ownership of the vessel *pro tempore*. And *3rdly*, That the owners virtually received the benefit of the homeward freight, by the transmission of the freight bills to *England*.

But with respect to the first objection, it is almost the invariable practice and usage, that the owners of a ship, although they let it out upon freight to a charterer, do themselves appoint the captain and the crew; the chartering of the ship not being so much the chartering of the hull, as of the ship in a state fit for the purposes of mercantile adventure. There seems no reason, therefore, that the chartering of the ship, in any particular case, to the captain of that ship, should create any more responsibility in the owners to the shippers of goods, where such fact is made known to them, than if the ship were freighted to an entire stranger.

The second objection is answered by reference to the charterparty, by which it appears, that the authority of the agent was limited to the superintendence of the acts of *Betham*, as captain, and not as freighter; the utmost authority given to the agent being that of displacing the

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master and appointing another, in case *Betham* should be guilty of a breach of any of the covenants or agreements on his part. But if *Betham* ceased to be master, he did, nevertheless, by the terms of the charterparty, continue to be the freighter of the ship, possessing the same power to take goods on board, and liable to the same responsibilities, on the one hand, to the owners, for the time-freight for which he had contracted; on the other hand, to the shippers of goods, for the safe conveyance of the goods shipped.

As to the third objection, the charterparty gives the owners a security upon freight bills received by the freighter, but gives the owners no direct or immediate interest in the freight earned, the whole of the surplus of which belongs to *Betham*. If *Betham* had obtained no homeward cargo from *Calcutta*, so that no freight bills could have been transmitted, the owners would still have been entitled to their time-freight. The freight earned by *Betham* on the intermediate voyage, for twelve months in *India*, does not become a security to the owners. Even in the homeward voyage, if the ship had been lost, there might have been no freight payable to the freighter, but still he must have made good his own liability to a monthly freight, for the use and hire of the vessel.

Upon the whole, therefore, we think that the effect of this charterparty was to make the freighter the legal owner of this ship *pro tempore*, and that the freight for the carriage of these goods was paid to him for his own use; and consequently, that the defendants below are not liable to an action for the non-delivery of the goods. We therefore think that the judgment of the Court of *King's Bench* must be reversed.

Judgment reversed.

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IN this case the defendant pleaded the delivery of two pipes of wine in accord and satisfaction of the plaintiff's claim; the plaintiff took issue on this plea, and the defendant demurred to the plaintiff's replication for delay. After joinder in demurrer, no rule having been given to bring in the demurrer books, and no paper books having been in fact delivered, *Alexander*, on *Saturday, 27th November*, moved for a *concilium* to be drawn up on *Monday* the last day of Term, *29th November*. He cited *Tidd's Practice*, 789, where it is laid down, that "where a sham plea is pleaded, and a demurrer to the replication appears to have been filed for delay, the Court, when there are not four days remaining of the Term, will grant a *concilium* for the last day of it. And where it appeared that the defendant had demurred for delay, the Court refused to set aside an order for a *concilium*, although four days had not been given to the defendant to return the demurrer book."

Where a defendant demurs for delay, and there is not a sufficient number of days in the Term to enable the plaintiff to conform to the usual practice in cases of demurrer, the Court will allow a *concilium* moved for on the last day but two of the Term, to be drawn up for the last day of Term, although no rule be given to bring in the paper books, and no paper books be in fact delivered.

Chilton, contra, contended, that the rule could not be granted. By the practice of this Court, the rule for a *concilium* is a four-day rule, and before a *concilium* can be moved for, there must be a four-day rule to bring in the demurrer books. These intervals of time are necessary, to enable the Court to see what the real nature of the case is, and ought not in practice to be dispensed with, *Thehlussen v. Bailie* (a). In this case, no rule has been given to bring in the demurrer books, and they have not in fact been delivered. The cases cited by *Tidd* do not support his position. In *Gent v. Vandermoolen* (b), the rule to bring in the demurrer books had been waived, and in fact the books had been delivered. So, in *Harrison v.*

(a) 2 Anstr. 409.

(b) M. & Y. 246.

Exch. of Pleas, 1830. **Richardson (a)**, the books had actually been delivered, and the rule for the *concilium* was drawn up as a four-day rule.

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The Master certified that the practice requiring a four-day rule to bring in the demurrer books, and a four-day rule for a *concilium*, had, on some occasions, been relaxed, where the demurrer was obviously for delay.

BAYLEY, B.—As there are instances in which the strict rule of practice has been departed from, and this is a very fit case for a departure from that rule, let the *concilium* be drawn up for the last day of Term.

Rule accordingly.

(a) M. & Y. 246.

Revenue.

THE ATTORNEY-GENERAL *v.* SIDDON.

Where a trader harbours and conceals smuggled goods, he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect the smuggled goods, though the master be absent at the time, and the act be done by the servant upon the exigency of the occasion, when the goods are discovered.

INFORMATION for penalties. The second count of the information charged, that the defendant harboured and concealed tobacco, the duty thereon not having been first paid; and the seventh count charged, that the defendant used and employed a certain permit for another purpose than to accompany the goods for which it had been obtained and granted.

At the trial, before *Alexander*, L. C. B., at the *Middlesex* Sittings after *Easter* Term, the following appeared to be the facts of the case:—An excise officer, upon making his survey, discovered upon the premises of the defendant a quantity of tobacco, for which he requested to see the permit. The servant of the defendant, who managed his business, said, that he had a permit, and should be able to find it, if it were not in the desk, which was locked up. In fact, there was no permit for this tobacco; but the servant sent a boy and obtained a permit for the removal of tobacco.

co from the stock of *S. & Co.* to the stock of the defendant, which he produced to the excise officer, as the permit for the removal of the tobacco discovered. This permit was for the removal of a different description of tobacco, and was granted, as appeared by the date, after the discovery was made by the excise officer. At the time of this discovery, the defendant was from home, and had been absent for some time previously. Upon these facts, it was contended, that this being in the nature of a criminal proceeding, the defendant was not liable for the act of his servant, unless the act was done with his knowledge and privity, of which there was no evidence; but the Lord Chief Baron told the Jury, that the defendant was liable for the act of his agent in the conduct of his business; and the Jury, under this direction, found a verdict for the Crown, upon the second and seventh counts.

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In *Trinity Term*, *Jervis* obtained a rule to enter a verdict for the defendant, on the seventh count, or for a new trial; against which—

Clarke and *Walton* shewed cause. An information for penalties is not strictly a criminal proceeding, but is in the nature of a civil remedy, to recover a debt due to the Crown. In a case like the present, therefore, the master is answerable for the act of his servant, done in the conduct of his business, although it may be admitted, that for a felony, he would not be liable. There are many authorities for the liability of the principal in such cases. Thus, a master may be charged in trover for a conversion by his servant, *Mead v. Hamond*(a), although the servant is also liable; *Stephens v. Elwall*(b); and a sheriff is liable for the act of his officer. *Brown v. Compton*(c). In a late case, *Rex v. Gutch*(d), this doctrine was fully discussed. That

(a) Str. 505. (b) 4 M. & S. 259. (c) 8 T. R. 424. (d) M. & M. 433.

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was an information for a libel in a newspaper, and, it appearing that the defendant never interfered in the management of the paper, and was, at the time of the publication, at a distance of more than 100 miles from *London*, where the paper was published, it was contended that he was not liable for the act of his agent. But Lord *Tenterden* was of opinion, that a person who derives profit from, and furnishes the means for carrying on the concern, and intrusts the conduct of it to one whom he selects, and in whom he confides, is answerable for the act of that agent: and the defendant was found guilty. So, here, the act is done in the business of the defendant, from which he derives a profit, and by a person selected by the defendant, and in whom he confides. To hold the defendant irresponsible, would be to paralyze the revenue laws, for, if absence were an excuse, no penalty could ever be enforced, and the laws might be evaded with impunity.

John Jervis, contra.—The argument of inconvenience cannot apply, for the party who does the act is responsible, and by proceeding *in rem* the goods are forfeited. Strictly speaking, this is not a criminal proceeding; but it is in the nature of a criminal proceeding, inasmuch that no new trial can be granted after a verdict for the defendant, and therefore it must be regulated by the same rules as if it were strictly a proceeding of that nature. Now, it must be admitted, that, in a civil proceeding, a principal will be answerable for the act of his servant, done in his master's employ; but even this is subject to this limitation, *viz.* that a master is not liable for an act done wilfully by his servant. *M'Manus v. Crickett*(a), *Boucher v. Noidstrom*(b), *Croft v. Alison*(c). Nor is he liable for an act done by the servant exceeding his authority, either express or implied. Thus, if "I command my servant to distrain, and

(a) 1 East, 106.

(b) 1 Taunt. 568.

(c) 4 B. & A. 390.

he ride on the distress, he shall be punished, and not I." *Noy's Maxims*, c. 44. A sheriff is liable for the act of his officer, upon grounds of public policy, and a proprietor of a newspaper is liable for a publication by his editor, upon grounds of public expediency, and because where the conduct of the paper is wholly intrusted to the editor, every publication is within the scope of this general authority, and a particular authority is presumed for the particular publication. But there is no case in which a master has been held liable for the act of a servant, who quits sight of the object for which he is employed, and, without having in view his master's orders, does that which his own malice and his own will suggest. In a case like the present, an authority cannot be presumed for an act which is illegal, and certainly the master can only be liable, upon a finding by the Jury, that the servant had authority, either express or implied, to do the act. In *R. v. Gutch*, the question of authority was left to the Jury, and the same course ought to have been adopted in this case. But if this be viewed strictly as a criminal proceeding, it is clear that the defendant will not be liable. The rule of the criminal law is, that he only is liable who does the act, or procures it to be done. *R. v. Huggins*(a). No authority can be presumed; and if the agent wilfully commit an act varying in substance from the instigation, or the same act upon a different object, the principal will not be liable. There are cases in which a master has been held liable for the acts of his servant in selling articles in which his master deals, and in the manufacture of articles which the master himself is presumed to make. Such was the case of *Rex v. Dixon*(b), in which the defendant was indicted for mixing crude alum with bread; and it appeared that the alum in question was mixed by the foreman of the defendant, and that, if diluted and used in moderate quantities, it was in-

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(a) 2 Ld. Raym. 1580.

(b) 3 M. & S. 11.

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noxious; but the Court held that the defendant was liable. In that case, it did not appear clearly, that the defendant was ignorant of the act of his servant; but, on the contrary, he knew that a certain quantity of alum was used; the servant, therefore, had authority to do the act: and, in selling the articles of his master's trade, a servant has also an authority, for he acts within the ordinary scope of the general authority received from his master.

Clarke, in reply.—The distinction between the liability of a master for the act of his servant, in a civil and criminal proceeding, is well understood. If the servant of a chemist sell poison in his master's shop, by mistake, and the purchaser take it and die, the master is not liable; but if the purchaser take it and recover, the master is liable in a civil action for the negligence of his servant.

Cur. adv. vult.

ALEXANDER, L. C. B., (after stating the pleadings and facts of the case, proceeded thus):—

The objection to the conviction which took place in this case was, that the master, the defendant, did not appear to have taken any personal share in the transaction, and the controversy was, whether he was liable in these proceedings for the act of his servant. It is my opinion that he was liable. The second count, on which the defendant was also convicted, was for harbouring and concealing this tobacco. There was no evidence to warrant the conviction upon that count, except that the tobacco was found on the premises of the defendant. It is an occurrence of every day to convict upon such evidence, and if the rule were otherwise, the laws would be completely inoperative. It is always competent to the defendant to prove his innocence if he can, but the finding is *prima facie* evidence upon which these convictions proceed. If he does not

prove his innocence, the law presumes his guilt from the fact of the goods being found concealed upon his premises.

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Now, it appears to me, that for the same reasons and upon the same principles, whatever a servant does in the course of the employment with which he is intrusted, and as a part of it, is the master's act. The legal presumption is so, unless the contrary be shewn. It is the presumption that the master authorized it.

This is admitted to be true, as far as civil liability goes; but it is argued that it is not true as to criminal or penal consequences. How far this rule may extend in criminal proceedings, I will not upon this occasion presume to say, but, to a certain extent, it unquestionably has been applied to criminal proceedings. The cases of *The King v. Dixon* (a), and *The King v. Gutch*, are of that description.

In the case of *The King v. Dixon*, it appeared that alum, though prohibited, was no unhealthy or mischievous thing, if mixed in a particular form, and if properly mixed; but that, if it was done imprudently or inadvertently in a crude state, it was extremely mischievous; in which state it had been mixed in that case. No doubt the master had authorized its mixture, but he had probably intended that it should be mixed in the proper way of mixing it, so as not to be mischievous, although even then it is a breach of the law; but he was indicted and convicted, and, I believe, punished, upon the principle of being liable for the acts of his servant.

It is not necessary for me, however, upon the present occasion, and for the present purpose, to say how far this principle might extend, for I think it quite clear, that it extends to this case. The provisions of the legislature would be inefficacious, if the master for whose benefit the operation is intended, were to escape these penalties which the

(a) 3 M. & S. 11.

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legislature has imposed, where the act was done in pursuance of the general purpose, which the servant was undoubtedly authorized by the master to carry into effect. It is evident, that all those provisions would, but for this construction, be unavailing.

The argument, in some measure, proceeds upon a notion that this is a criminal proceeding. For some purposes, unquestionably, this proceeding has received a narrow construction, because it resembles, in some respects, a criminal proceeding; but, on the other hand, it is said to be a civil demand of the Crown. Without entering into that question, I think, that the doctrine of responsibility applies to this case, and that the demand of the Crown would, in very few instances, be effectuated, if it were understood that the master was not liable for the conduct of his servant. Then a man of straw would be put up, and the real person who was to derive the benefit, and who could alone be effectually subjected to the demand on the part of the Crown, would escape. I think, therefore, that the rule must be discharged, and that the conviction upon the seventh count is perfectly right.

BAYLEY, B.—I am of the same opinion with the L. C. B. In the first place, I consider this as being not properly a criminal proceeding, but a civil proceeding, for the purpose of recovering that which is a debt of the Crown. It is a penal proceeding. An action to recover the amount of penalties for giving receipts upon unstamped paper, is a penal proceeding. But I do not consider that as being a criminal proceeding. But whatever the nature of this proceeding is, whether penal or merely civil, this is a case in which, to my mind, the act of the servant is to be considered as being an act done in the master's business, and within the scope of the authority probably given by the master to the servant.

This is not the ordinary case of a servant selling in his master's shop the articles in which the master deals, in which it is quite clear that he is acting within the ordinary scope of the authority which he has received from his master, and therefore that the act of the servant, in making the sale, is the master's act; upon which principle all the cases of libel have gone. *The King v. Almon* (a), *The King v. Gutch* (b). In these cases, the act of the servant was considered as being the master's act.

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Neither is this the case of an act done by a servant in the manufacture of articles which the master is himself to manufacture. There the servant is merely acting in the business of the master, and within the scope of the authority which he actually receives from his master. The authority which he receives from his master is an authority to make and manufacture, and the master is responsible for his conduct *prima facie*, as to the means he adopts in making and manufacturing.

But this is a case certainly of a different description, and I agree with the distinction that was taken when it was argued, that this does not fall within the ordinary range of the cases of a servant's act being the master's act. But, in order to form a judgment, whether this is the master's act or not, and within the scope of the authority which ought to be considered as given by the master to the servant, you must look at the nature of the act, and see with what view that act was done, and the participation which the master had in any thing to which that act referred.

This is the case of a servant of a fraudulent master, endeavouring, by his own act, to conceal his master's fraud, and to prevent the consequences which would otherwise fall upon the master in respect of that fraud. From the nature of the service in which the party is employed, and

(a) 5 Bur. 2686.

(b) M. & M. 433.

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from the conduct of the master in his fraud, you may infer whether or no the servant had *prima facie* an authority from the master; not perhaps, specifically, for the doing of this specific act, but for the purpose of doing that which, in the exercise of his discretion, upon a moment of embarrassment, which the possession of an improper article might naturally create, the servant should think and deem to be best.

In this case, the master has, upon his premises, certain goods, which are unlicensed; they are there without a regular permit; a detention of these goods would bring upon the master loss of character, and, to a certain extent, would bring upon him loss of property, and subject him to pecuniary penalties. Under these circumstances, the master, having full knowledge that the things were there, (for we are bound to consider that as an ingredient in the case), and knowing what the consequences of their detection would be; what, in the course of such a business so illegally carried on, is the authority which you would naturally expect to be given by the master to the servant? I cannot conceive that it would be any thing short of this: Do what you can to save my character; do what you can to save my property; do what you think reasonable for the purpose of protecting me from the penalties which will follow detection. Has the servant any purpose of his own to answer? None. In the conduct he pursues, he acts not for his own benefit, but for the benefit of his master. It matters not to him whether the articles are seized or are not seized. When a servant is concerned in an illegal trade of this description, it is clearly for the benefit of the master. The servant runs a great personal risk; and why? It can only be with a view to protect his master. When, in the case of a master sanctioning and carrying on an illegal traffic of this description, the servant adopts means which are calculated to save the master, and which can have no

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other object, it seems to me, that, *primâ facie*, the act which the servant adopts for the purpose of saving the master ought to be considered as being an act done by him in the service of such master, for the benefit of such master, and within the probable authority which the master gives to the servant with reference to articles of that description. It is upon this ground, I think, that there was *primâ facie* evidence to charge the master with the act of the servant in this particular case, so that the act of the servant was to be deemed the master's act, and within the scope of that authority, which it was likely the master would give with reference to articles of that description. We must always form our judgment of the extent and nature of the authority which the master confers upon his servant, by the nature and character of the business in which the servant is to be from time to time employed.

I am therefore of opinion, that, in this case, there was *primâ facie* evidence to shew, that the act of the servant was the act of the master. The master was certainly at liberty to have produced evidence for the purpose of rebutting that *primâ facie* case; but, in the absence of any evidence to rebut that case, I am of opinion, that it was rightly left to the Jury, and that the Jury were bound to consider it as being the master's act, and that, consequently, the verdict on the seventh count is right.

GARROW, B.—The case of *Rex v. Dixon* is, to my mind, decisive of the present. The extent of the authority can only be gathered from the circumstances of each case; and when you find the master in the possession of illegal goods, the act of the servant, for the protection of those goods, with no personal object in view, is, in my opinion, *primâ facie* the act of the master.

VAUGHAN, B.—I entirely concur, not only in the deci-

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sion which the Court have come to upon this question, but in the reasons which have been given for that decision. I agree, that, in order to fix a party with the penalties of the statute, it is necessary that the Jury should be satisfied, by reasonable evidence, either that the party accused himself did the illegal act charged with respect to the permit, or that he caused it to be done by the instrumentality of the servant, who may have authority for that purpose, either express or implied, actual or constructive. Now, no arguments have been addressed to the Court to shew that the defendant was improperly convicted on the second count, which imputes to him the offence of harbouring and concealing these goods; and the admission, that he was properly convicted upon that count, seems to me to put an end to this question, because, upon that conviction, the reasonable presumption arises, that the shopman was authorized by the master to do the act upon which the conviction upon the seventh count proceeded. The master was not present when the goods were deposited, nor was the master present when the permit in question was fraudulently obtained; and therefore, if the absence of the master from the premises were to raise a presumption in his favour in this instance, it would equally apply to the other count. But it is admitted, that he is properly charged with fraudulently harbouring and concealing, and that this was an act done in order to cover the property, in endeavouring to get a permit applicable to that property. Therefore, it seems to me, that the Jury were perfectly warranted upon this evidence, which was *prima facie* evidence, liable to be repelled by other evidence which might contradict the presumption, in finding the defendant guilty upon the seventh count. I think this evidence was sufficient to raise the presumption, that it was the act of the defendant. This is not, properly speaking, a criminal proceeding; and therefore the distinction taken between criminal and civil proceedings does not apply. This

is in some measure a penal proceeding, but it is not a criminal proceeding.

Rule discharged.

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RIDOUT, Executor of RIDOUT, v. BRISTOW *et Ux.*

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ASSUMPSIT upon a promissory note made by the wife of the defendant *dum sola*, widow of the plaintiff's testator's son, for 100*l.*, expressed to be payable to the testator twelve months after date, "for value received by my late husband." Plea, *non assumpsit*.

At the trial, before *Bolland*, B., at the last *Salisbury* Assizes, the plaintiff having proved the note, it was objected for the defendant, that the note, upon the face of it, was a voluntary note for the payment of the debt of another person, without consideration, and was therefore void. The plaintiff then gave evidence of liabilities incurred by the testator on behalf of his son, the late husband of the defendant's wife, and of some payments in respect of those liabilities. The defendant called a witness, who proved a declaration by the plaintiff's testator, that his son had died worth worse than nothing, for he owed him several hundred pounds. This evidence was left to the Jury, who found a verdict for the plaintiff; and the learned Baron gave the defendant leave to move to enter a nonsuit.

A widow gave a promissory note "for value received by my late husband." Held, first, that the note was valid on the face of it, and secondly, that the defendant was not at liberty to shew as a defence, that it was given as an indemnity against liabilities incurred on behalf of her late husband, and that the payee had not been damnified.

E. Lawes, Serjt., accordingly, in this Term, obtained a rule for that purpose; against which—

Follett now shewed cause.—The question in this case is, whether, from what appeared on the face of the note, the plaintiff ought to have been nonsuited on the ground that there was no sufficient consideration between the par-

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ties. It is quite an elementary principle; that a promissory note imports a consideration, and that it lies on the defendant to impeach it. The only way in which the objection, as arising on the face of the note, can be put, is this, that a legal consideration is negatived by what appears on the note. It is clear, however, that if *A.* owe *B.* a debt, and a third person choose to give *B.* a note, such debt is a sufficient consideration to bind the maker of the note. The cases cited as to the consideration necessary to support a promise to pay a debt due from a third person, are totally inapplicable to this case; for the plaintiff here is not suing on any special agreement to pay the debt of a third person, but on an instrument which imports a consideration. It is said, however, that the defendant had no assets as executrix of her late husband. That did not appear; but if it did, it was quite immaterial. In *Child v. Monins* (a), where the defendants gave to a creditor of their testator a promissory note, whereby "as executors, they severally and jointly promised to pay the plaintiff, on demand, with interest," it was held, that such note made the defendants personally liable; and a plea that they were executors, and had given the note as such, and *plene adminstraverunt præter* was held bad on demurrer. But even if it had been necessary to prove any consideration, it appeared that the plaintiff's testator had made himself liable for the debts of the defendant's late husband, and evidence was given to prove payments under such liabilities, and the Jury found that the plaintiff was entitled to recover the whole amount of the note.

E. Lawes, Serjt., and *Burstow*, *contra*.—The objection is, that, on the face of this note a valid consideration is negatived. It imports a voluntary promise, to pay the debt of another, without consideration. *Child v. Monins*,

(a) 5 B. Moore, 282; 2 B. & B. 460.

is inapplicable to this case. The judgment proceeded upon circumstances apparent in that case, which do not exist in this. The promise to pay, as executors, was an admission that the defendants were executors, and the stipulation to pay with interest shewed the present existence of a debt, and a forbearance, which was a sufficient consideration. Here there was proof that there were no assets, and the note not being payable with interest, does not import a forbearance. In that case also, the promise was to pay jointly or severally, which made the defendants personally liable. This is, in fact, an indemnity note, and it was incumbent on the plaintiff to shew that he was damnified. He did not shew that he was damnified, for the evidence upon that subject totally failed. But this note is also void, because it does not sufficiently express a consideration within the statute of frauds. *Wain v. Walters*(a), *Rann v. Hughes*(b).

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BAYLEY, B.—This is an application to set aside a verdict for the plaintiff, and to enter a nonsuit. It is an action upon a promissory note. A promissory note, *prima facie*, imports a consideration, and it is not necessary to give evidence of consideration *aliunde*. But it is insisted, that, as the note in question imports on the face of it a peculiar description of consideration, that circumstance varies the general rule, and throws the burthen of proving consideration upon the plaintiff; and it is argued, that this note is void upon the face of it, for want of expressing assets or forbearance. It is perfectly clear, that if, instead of taking a note, you take from a third person a written security, which cannot be supported without proof of consideration, that security must, upon the face of it, import a consideration, and there must be evidence to prove such consideration. But you may bind yourself by

(a) 5 East, 10.

(b) 7 T. R. 350, n.

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an instrument, which in its form imports consideration, without expressing the consideration, or proving it *aliunde*.

In this case, the party signed a promissory note, expressed to be for value received by her late husband. She appears to have been the administratrix; but even admitting that she was not, and supposing that, out of respect to the memory of her late husband, she had agreed to give a note for what was due from him, would not such a note be binding? I take it that it would. There is a good consideration, which makes it reasonable that the security should be given; it is not a case of the want of a consideration, but of the existence of a consideration.

The case of *Popplewell v. Wilson* (a) establishes that a note is binding, though it purport, on the face of it, to be for the debt of a third person. But it is said, that that was the case of a promise to pay the debt of a living person, and that therefore there was a forbearance, which is a good consideration. That answer does not shew that the case is inapplicable to the present question, because there may be forbearance to the representatives of a dead man, as well as forbearance to a man whilst living.

But it is argued, that there is in this case an absence of consideration, because, it is said, that there was evidence that there were no assets. That, however, did not appear, though there was evidence that there might ultimately be a failure of assets; for the evidence only shewed, that the son died considerably indebted to the testator, and there was no proof that there was no household furniture, or other assets.

If an administratrix take upon herself to give a security, which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind, the act of giving such a security supersedes the necessity of

(a) 1 Str. 264.

an investigation as to there being assets. It seems to me, that the words "value received by my late husband," do not make the proof of assets necessary; and I go still further and say, that it was not competent for her to shew that there were no assets.

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The cases upon the statute of frauds do not apply to the present, nor do the cases in which it has been held that a promise to pay the debt of a third person without consideration is *nudum pactum*. It is just, that a promise to pay that which I am under no legal or moral obligation to pay, should be considered as *nudum pactum*; but this does not apply to an instrument importing a consideration, and which may induce forbearance to the party. I am therefore of opinion, that, in this case, a consideration must be taken to exist, and that the maker of such an instrument is at least *prima facie* liable to pay it.

I doubt much, whether, upon an instrument worded like the present, it is competent for the party to start up and say, that it was given merely as an indemnity. It is an attempt to prove by parol something inconsistent with the written document. You may prove failure, or want, or illegality of consideration, but I am not aware of any case in which a party has been allowed to prove a difference of consideration. But it is not necessary to decide that point in this case, because, upon the evidence, it appeared that various sums had been paid, which the evidence for the defendant, if admissible, did not disprove.

GARROW, B., concurred.

VAUGHAN, B.—I am of opinion that there is no foundation for this rule. It was moved on the ground that this was not a note in the usual form, but an indemnity note merely. Upon looking at the note, it appears to be in the usual form, and like all other notes, with the exception of the words "by my late husband." The plaintiff, on proof

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of this note, might have closed his case, but he was induced to go into evidence of the consideration, and the Jury found that there was a sufficient consideration. Even if it were competent for the defendant to prove that this was merely an indemnity note, upon the evidence the plaintiff is entitled to recover; but I think that it would be going a great way to allow the defendant to contradict the written instrument, and shew that it was given as an indemnity merely.

BOLLAND, B.—I agree with the rest of the Court, that this rule should be discharged. At the trial, I reserved the point, because the note was drawn in somewhat an unusual form.

BAYLEY, B.—There are cases which establish, that you cannot give parol evidence inconsistent with the form of the note. You cannot vary, by parol evidence, the nature of the obligation. The authorities go to shew, that parol evidence is inadmissible to vary the time for payment expressed in the note. In *Rawson v. Walker*(a), a note was payable on demand, and evidence was offered to shew a liability on a contingency only. Lord *Ellenborough* said, “I am ready to admit any evidence for the purpose of shewing that the consideration of the note was illegal; but I cannot receive parol evidence inconsistent with the terms of the note.” I am therefore of opinion, that the defendant was not at liberty to give the evidence in question, as it was inconsistent with the terms of the note.

Rule discharged (b).

(a) 1 Stark. 361. See *Hoare v. Graham*, 3 Camp. 57; *Dubé v. Dow*, MS. Chitty on Bills, 61, n.

(b) See *Haywood v. Watson*, 4 Bingh. 497.

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THE ATTORNEY-GENERAL *v.* BELL.

INFORMATION for the duties of excise on flint glass, under the stat. 6 *Geo.* 4, c. 117.

A second trial having been ordered by the Court^(a), the jury found a special verdict, stating the facts which appear in the report of the argument upon the former occasion, with this additional fact, that the 76lbs. of glass laded out by the manufacturer from pot No. 6, were mixed with other materials, and put into the same pot, which was again stopped, again duly opened, gauged, and charged with duty in the course of the same journey.

The case was argued in Easter Term last, by *Walton*, for the Crown, and *Patteson*, for the defendant.

Cur. adv. vult.

The judgment of the Court was now delivered by ALEXANDER, L. C. B.—This case has stood over for consideration for some time, rather because it was stated to be a case of great consequence and importance to the revenue than from any doubt which we have entertained upon it. A special verdict has been found, upon an information for duties on the manufacture of glass. The question depends upon the true construction of the stat. of 6 *Geo.* 4, c. 117. The Crown and the manufacturer take different views of the construction of a clause of that act, and it is our office to decide between them. The regulations contained in this act, and the restrictions to which the manufacturer is subjected, have in view the revenue that the State is to derive from the manufacture in question. On the part of the Crown, it is represented, that, if the practice contended for by the defendant is allowed, the revenue

Where a maker of glass, before the termination of a journey, unladed, under notice, the materials remaining in a pot, part of which he had worked out, and put those materials with others into an overtaker, which was gauged, and the duties charged and paid thereon: *Held*, that he was entitled to a deduction from the duties payable upon the gauge of the entire journey, in respect of the materials so laded out, having paid the duty in respect of those materials on the gauge of the overtaker.

(a) See 2 Y. & J. 431.

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may be injured, and may be seriously defrauded, not by the defendant, who is represented to be a gentleman of most respectable character, and utterly incapable of any dishonourable conduct, a representation to which I give full credit; but the officers of the Crown say, it will open a door to frauds by persons less scrupulous, and disappoint the object which the Legislature had in the various regulations provided in this act. On the other hand, the defendant says, that, what he insists upon is entirely consistent with the provisions of the act, and that the revenue will be in no danger; but that the rule prescribed on the part of the Crown will subject the manufacturers to great loss and inconvenience. We are bound by the language of the act, and can apply arguments *ab inconvenienti* only to construe the language; to carry it further, would be to usurp the province of the Legislature.

The general mode of conducting the manufacture is as follows: all the pots are stopped about the same time, in the beginning of the week; they are then placed upon the furnace; when they are supposed to be fused, upon a notice being given, they are unstopped, and a gauge taken of the quantity of materials they contain; and the duty is charged upon the manufacturer on the amount of that glass. As many circumstances may arise to render the whole, or a considerable portion of the materials useless, provisions are contained in the act for securing to the manufacturer an allowance for what he cannot use, that is, for deducting from the gross charge the duty on the materials not actually worked up into a saleable commodity. The manufacture of each week is called a journey, and the general scheme is, that all the pots that constitute a journey, are to be stopped up at the same time, to be fused about the same time, and to be unstopped and gauged about the same time; but, for the accommodation of the manufacturer, liberty is given to add pots in the course of the week. When this is done, they are called overtakers. It is also

one of the statutory regulations, that overtakers, though they begin at different times, shall be worked out with those pots to which they shall be added, that is, at the end of the same week.

After this preliminary statement, which I thought necessary, because some time has elapsed since the argument of the case, I will advert to the special verdict, and the clauses in the statute.

It is stated in the verdict, that the defendant, *Bell*, is a maker of flint glass; that, on the 5th of *August*, 1825, several pots were laded at his glass house; among others, one No. 6; that they were opened on the Monday following, being the 8th; that they were then gauged by the officer, and No. 6 was gauged at 1453*lbs.*, and the contents charged with duty; that the contents of this pot, No. 6, were worked out, except 76*lbs.* which had become unfit for use; that the journey ended on *Friday*, the 12th; that, before that time, a notice was given to lade out No. 6 on *Tuesday* the 9th; it was so laded out and put into water on the 9th, and thereupon the duty on the 76*lbs.* was deducted by the officer from the prior charge. The special verdict further states, that, afterwards, the 76*lbs.* in question so laded out by the manufacturer, were mixed with other materials, and put into the same pot, which was again stopped, again duly opened, gauged, and charged with duty, in the course of the same journey. The rest of the special verdict is occupied in stating the same operations, attended exactly with the same circumstances, in many other instances. The officer deducted the duties on the materials laded out in all those instances. The whole sum amounts to 24*l.* 18*s.* 3*d.*, for which this information is filed.

The question for the opinion of the Court is, whether this deduction and allowance should have been made.

The first clause referred to, and the only one directly in point, is the 8th section. That clause enacts,

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“ That, from and after the 5th day of *July*, 1825, all and every maker or makers of flint glass shall, and he, she, or they, is and are hereby required, at or before the hour of six o'clock in the evening of *Saturday* in each and every week, to work out into wares, or to cause and procure to be worked out into wares, the whole of the materials, metal, or other preparations, which at any time during that week shall have been fluxed or melted in any pot or pots, to him, her, or them belonging, for the purpose of making flint glass; or, upon a notice for that purpose given by such maker or makers of glass, to the proper officer of excise, six hours before he, she, or they shall commence to lade any part of such metal, to lade out, in the presence of the supervisor or officer attending upon such notice for that purpose, the whole of such materials, metal, or other preparations as aforesaid, which may remain in such pot after such maker or makers shall have ceased to work out any wares therefrom.” Then it provides, “ And the gauged weight of such laded fluxed materials, metal, or preparations, as taken by the supervisor or officer in the pot, shall be deducted from the weight of glass for or in respect of which such maker or makers shall at that time be chargeable with duty upon the gauge thereof taken in the pot, according to the provisions of this act.” Then a penalty is imposed upon the persons disobeying that provision.

Now, here the direction is clear, and it is just what has been done in this case; it says, the gauged weight of such laded materials shall be deducted from the weight in respect of which the maker shall be chargeable. The mere lading out upon notice, and in the presence of the officer, according to the language of the act, entitles the manufacturer to the deduction.

It is contended, on the part of the Crown, that this clause must be construed with reference to other clauses; and that the other clauses shew that this allowance, though there is

no condition or limitation annexed to it in the specific clause, should be postponed to the end of the journey; and that the materials so laded out should not be used in the same journey.

The clauses referred to for this purpose are the 12th, 13th, 14th, 15th, and 16th. I am not able to apply the 12th in any way. It requires that no pot shall be set on the furnace without notice, so that the position shall not be altered, nor the pot charged, without notice. The 13th is to this effect: the object of it is to provide, that, from the time from which the act is to operate, it shall not be lawful for any maker or makers of flint glass to unstop, or take down any stopper from his, her, or their pot or pots, containing any materials or metal, or other preparation, for the purpose of making flint glass, (the same not being a pot cracking or breaking whilst the same is filled with such materials, metal, and preparations, as aforesaid), without giving six hours' notice, in such manner as has been provided by the act; and all such pots as aforesaid, which shall be charged with any such materials or metal, or other preparation, for any particular journey or making of flint glass, upon such notice to unstop the same, or take down the stopper thereof as aforesaid, being given, shall be opened all together, and at one and the same time, upon the attendance of the officer or supervisor of excise, (if he can be present), for that purpose, and in the presence of such officer or supervisor; and if, upon opening such pots, any pot or pots shall be found to contain materials or metal, or other preparations for the making of flint glass, then unfit for the making or working of the same out into glass wares, the whole of the pots charged with such materials or metal, or other preparations of such particular journey or making, shall be stopped up again, and a fresh and like notice for unstopping the same, or taking down the stoppers thereof, shall be given as aforesaid.

Now, the substance of this provision is, that no pot shall

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be opened at all, except upon notice; and it appears to be the intention of the Legislature, when any such notice is given, that all the pots shall be opened and manufactured at the same time, because, if the manufacturer finds one pot not ready for use, the whole process must be stopped until that pot is ready; it is not competent to the manufacturer to manufacture those which are ready; all the others must be stopped up again, and wait till that which is deficient is ready. That has no direct bearing upon this case: here the act was complied with.

Now the next clause adverted to is the 14th. This section gives authority to the manufacturer to charge fresh pots after the expiration of the time mentioned in the former notice of charge; but he must give other notice thereof, according to the provisions of the act of the 17th George 3rd; and they are to be called overtakers. It says, that after the pots of any particular journey or making of flint glass shall have been charged under notice, and after the expiration of the time mentioned in such notice, it shall be competent to the manufacturer to fill or charge any fresh pot or pots, (commonly called overtakers), with materials or metal, or other preparations for the making of flint glass, at any time during such journey or making of flint glass, upon giving such similar notice in writing; and then it enacts, that those pots shall be opened in the same manner, and at one and the same time with the other pots. Now, that exactly gives authority for what was done upon this occasion. The materials were laded out upon a notice being given, and when the overtaker was filled, it was filled in part with those laded out materials. Every thing was done in strict compliance with the directions of this section.

The 15th clause is a provision for the whole pot. It is to this effect—That in case the metal in any pot for the making of flint glass shall become unfit for use, or shall be incapable of being worked or manufactured into

wares, then the maker or makers shall give notice thereof immediately to the officer of excise under whose survey he, she, or they shall then be; and such pot or pots shall be thereupon allowed to remain and continue until the end of the week in which such pot or pots shall have been charged, with all the materials or metal, or other preparations for the making of flint glass therein; at which time, the materials, metal, or preparations in such pot or pots, shall be laded out in the presence of the supervisor or the officer of excise; and if such supervisor or officer be satisfied, that no alteration has been made thereon, the gauged weight of the fluxed materials, metal, or other preparations so laded out, shall be deducted from the weight of the glass with which such maker or makers shall be chargeable. The question is, whether the part that has become unfit, shall remain until the end of the week. This is a provision that relates to the whole pot; and it would be a strong thing, I think, by inference only, as it does not relate to that part of the pot which had been chiefly worked out, to say, that it is a provision that it shall remain in the pot, and that none shall be laded out, though the other clause gives authority, where it is worked out in part, to lade out the rest. It is too much to say, that the fifteenth section is a repeal of what is provided for in the eighth.

The 16th, which is another clause cited in the special verdict, relates to coloured glass. Upon this particular subject too, it is clear, that the allowance is not to be made till the end of the journey. It seems to me, that the second charge is to be made at the same time as the allowance is to be made for that which had been laded out. The substance of this provision is, that when the materials put into the pot shall be coloured, to make coloured glass, and it turns out that the manufacturer is not satisfied, that he has rightly made the mixture for the colour, he may send to the office, that the pots may be unstopped and un-

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laded, that he may make such change as he wishes; but it is clearly and particularly directed in that section, that the allowance shall not be made till the end of the journey, because it is to be laded out after it is properly fused, with the other pots made on that journey.

It appears to me, I confess, on these several occasions, that it was the object not to make the allowance for what was laded out till the end of the journey, and so it is to be satisfactorily inferred upon the occasions referred to. But in the instance stated in the special verdict, such a conclusion cannot be drawn from the clause which relates to it; the allowance is to be made on the quantity laded out.

On the motion for a new trial, when the rule was made absolute, it appeared to me, that there was enough in the observations made for the Crown to throw it upon the defendant to shew that the materials remained *in specie*, or had been disposed of so as to pay the duty. It appears, from this special verdict, that the defendant has done that. It is expressly stated, that the quantities laded out were placed in overtakers, were gauged, and paid the duty. I am not able to discover how the revenue can suffer, if, at the time of the settlement, the defendant must shew that the material remains unused, or that it has paid the duty.

I think, the Crown is not entitled to recover the duties in question, which, in effect, have been paid to them upon these materials.

If the burthen of proof were not thrown upon the manufacturer, I think that there might be great danger that the revenue would be greatly defrauded; but, if that is thrown upon him, as in this case, I do not see how it is possible that there can be any danger. This is what is reported as falling from the Court on the occasion of the application for a new trial:—"It appears to me, both from the nature of the case, and the particular provisions of the other clauses in the act of Parliament, that the construction put upon this clause by the Crown is correct; and that, before the

defendant can claim this allowance, he ought to shew, either that the material remained *in specie* at the time the account was made up, or that he placed it in some other pot in a new course, or in an overtaker, where it would pay the duty. It is incumbent upon him to do that to relieve himself from the duty; and not having done that, the verdict is erroneous, and there must be a new trial(a).” Now, in this case, that is exactly the thing he has done. The special verdict is founded upon it; and, in order to be consistent, we must hold, that, in this case, there must be judgment for the defendant.

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Judgment for the defendant:

(a) 2 Y. & J. 443,

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of *Exchequer*).

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SCIRE FACIAS upon a recognizance. The defendant set out the condition of the recognizance, which was, to abide the award of *D.*, and pleaded *nul tiel agard*.

The prosecutor replied, that, after the making of the recognizance, it was, by rule of Court, ordered, that *M.* should be substituted for *D.*, and that *M.* made his award, &c.; demurrer, and joinder.

The condition of a recognizance to abide the award of *D.* cannot be varied by a rule of Court¹ substituting *M* for *D.*

Upon the argument of this case, in the Court of *Exchequer*, that Court gave judgment for the defendant(a),

(a) 3 Y. & J. 101.

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whereupon a writ of error was brought, and the case was argued before Lord *Tenterden*, and the Lord Chief Justice of the *Common Pleas*, by *Manning* for the prosecution, and *Dampier* for the defendant.

The Court of Error, this Term, affirmed the judgment of the Court of *Exchequer*.

Judgment affirmed.

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BECK v. BREE, Clerk.

The word "tithes," in ancient documents, does not necessarily import, that tithes were then payable in kind, but may mean a money payment in lieu of tithes.

Where, upon an issue upon a district modus, the plaintiff clearly proved the existence for 150 years of the payment pleaded, and the defendant produced Pope *Nicholas'* taxation, and other documentary evidence, which ascribed to the rectory, and to the property in respect of which the modus was pleaded, values inconsistent with the alleged modus:—*Held*, after verdict for the plaintiff, that it was for the jury to say to what weight the documentary evidence was entitled, and that they might take into their consideration whether the documentary evidence ascribed to the rectory and the district their real value at the time.

THIS was an issue directed by the Lord Chief Baron, to try the existence of a modus of 3*l.* 6*s.* 8*d.*, in lieu of tithes, for a certain district or tract of land, commonly called *Allesley Park*, containing 327 acres, 3 roods, 4 perches, and situate partly in the rectory and parish of *Allesley*, and partly in the adjoining parish of *Stoneley*, in the county of *Warwick*.

At the trial, before *Alexander*, L. C. B., at the last Assizes for the county of *Warwick*, the plaintiff proved by terriers, (some of which were signed by the patron and incumbent,) receipts, and parol evidence, that this payment had been made in respect of *Allesley Park*, (during that time consisting of different farms), for upwards of 150 years. It further appeared, by the will of Serjeant *Flynt*, 22nd August, 1670, and by a conveyance dated 31st January, 1692, in which the different parcels of this property were enumerated, that the whole had been at that time "anciently called or known by the name of *Allesley*

Park." And further, that the advowson had been purchased in the year 1741 for 1200*l.*, from the proprietor of *Allesley Park*, at which time, as it appeared by other evidence, the modus was in existence. The plaintiff also produced an inquisition, 16 *Jac.* 1, after the death of *Anne* Countess of *Dorset*, in which the property was described as "all those closes, lands, tenements, meadows, pastures, woods, and hereditaments, known by the name or names of *Allesley Park*, otherwise *Ouseley Park*, situate, lying, and being in the county of *Warwick*," and which were stated to be "worth yearly in all issues, beyond reprises, five pounds."

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The evidence for the defendant was directed to three points:—1*st.* That tithes in kind had been paid within time of legal memory. 2*ndly.* That the modus had not been originally paid for the district consisting of 327 acres, 3 roods, 4 perches. 3*rdly.* That the payment was rank.

In support of the first proposition, an extract from a register, A. D. 1249, of the priory of *Coventry*, preserved in the King's Remembrancer's office, was produced, made by the official of the Bishop of *Lichfield*, the Archdeacon of *Coventry*, and the rectors of *Anestie (Allesley)*, and *Pakynston*, on behalf of the convent of *Coventry*, elected and sworn, by which, with the consent of the convent and rector of *Anestie*, they assigned to the rector "all oblations and obventions, tithes, and profits, to the said church belonging, except altogether to the church of *Coventry*, &c., and the tithes of the park of the same town, and all personal tithes."

In support of the second proposition, the defendant produced an inquisition, 7 *Ed.* 1, A. D. 1279, made in all towns and places throughout the counties of *Warwick* and *Leicester*, because of divers usurpations; by which it appeared that *John de Hastings* was Lord of *Allesley*, and had "a certain park from old, containing thirty acres."

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Upon the third point, the plaintiff produced the following documents:—

Pope Nicholas's Taxation, A. D. 1291.

"Archdeaconry of *Coventry*,

Deanery of *Coventry*,

The church of *Allesley* . . . 12 marks."

An inquisition, *post mortem*, 6 *Ed. 2*, A. D. 1313, which, amongst other things, found, that *John de Hastyns* the elder, held the manor of *Allesley*, &c., where there is one capital messuage 5*s.*; a dove house, worth by the year 4*s.*; also there are in demesne 132 acres of arable land there, which are worth by the year 33*s.*, the price of the acre 3*d.*; also there are nine acres of meadows there, which are worth by the year 18*s.*, the price of the acre 2*s.* *There is a certain park there inclosed, the underwood whereof, with the herbage, is worth by the year 13*s.* 4*d.* &c.*

An inquisition, *post mortem*, 18 *Ed. 2*, A. D. 1325, which, amongst other things, found that *John de Hastyns*, late lord of *Abergavenny*, held, &c. the manor of *Allesley*, where there is a capital messuage, the site whereof, with the herbage and part of the garden, is worth by the year 2*s.*; also a certain dove-house there, worth by the year 3*s.*; also two hundred and sixty acres of arable land, in demesne there, which are worth by the year 48*s.* 9*d.*, the price of an acre, 2*s.* 0½*d.*; also forty acres and a half of meadow, worth by the year 31*s.* 2½*d.*, the price of the acre 9½*d.*; also a several pasture there, which contains by repute forty acres, worth by the year 8*s.*, &c.; *also a certain park there, the underwood whereof is worth nothing; but it is worth, in the agistment of cattle in the summer, by the year 12*s.* and no more, because, in the same there are wild animals, (bestiæ silvestres), &c.*; "also the bondmen with the cotterells ought to perform two hundred and thirty-five works in the turning and carrying off hay in the summer," &c., and the said bondmen and cotterells

ought to perform seventy-three works on the *park* of the lord, that is to say, to inclose the same, &c.

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Nonæ Rolls, 14 *Edw.* 3, *A. D.* 1341.

Allesley.—"The church of *Allesley*, &c. is taxed at twelve marks, the demesne land of the rector, with the tithe of hay, and other small tithes, oblations thereto, and obventions to the altarage belonging, are worth, one year with another, five marks."

The Ecclesiastical Survey, 26 *Hen.* 8, *A. D.* 1535.

"The Parish Church } Master *Edward Pontesbury* is rec-
of *Allesley*. } tor there, and is worth in land called
glebe land, in tithes of grain and hay, and in other
tithes, oblations, and spiritual endowments, beyond
8s. to be allowed for procurations and synodals
yearly, payable to the archdeacon, by the year,
17l. 18s. 8d."

An indenture of lease, 12th *May*, 3 & 4 *Ph. & M.* *A. D.* 1556, by which, after reciting a former lease, 16th *May*, 15 *Edw.* 6, of the park and ground, called *Allesley Park*, except the wood, for twenty-one years, at the rent of 20l., Lord *Abergavenny* demised to *R. F.*, for certain sums of money then to the said Lord *Abergavenny*, in his need disbursed and paid by the said *R. F.*, his park and ground, called or known as *Allesley Park*, with the woods, &c. for twenty-one years, at the rent of 40l.

And a bargain and sale, by way of mortgage, 28th *May*, 3 & 4 *Ph. & M.*, *A. D.* 1556, from Lord *Abergavenny* to *R. F.* for 400l., of "all that his park and ground, called or known by the name of *Allesley Park*, in the county of *Warwick*, then lately inclosed with pale," and the old lodge, and all other his lands, &c., with the said park; with a proviso for redemption upon payment of the 400l. upon a day certain; and, in default thereof, that *R. F.*, upon the payment of the further sum of 200l., should stand seised of the property for ever.

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The defendant also produced the bailiff's accounts of the manor of *Allesley*, in the reigns of *Hen. 7* and *Hen. 8*; in which were items for the agistment of the park there, demised to *G. W.*, *8l. 3s. 4d.*, and receipts from the farmers of the herbage, for half a year, *4l. 0s. 2d.*, and for a whole year, *9l. 16s. 11d.*; but no charge for the payment of a money composition in lieu of tithes.

It appeared that there were, upon this district, vestiges of very ancient inclosures.

The Lord Chief Baron told the Jury, in his summing up, that the word "tithes" in the register A. D. 1249, did not necessarily import that tithes in kind were then payable; and that the term would be satisfied, should they be of opinion that at that time a money composition was payable in lieu of tithes. He further told them, that if they were satisfied that the *modus* had not existed from time immemorial, or was not payable for the district in question, they should find for the defendant.

The Jury found a verdict for the plaintiff, establishing the existence of the *modus*.

In this term, *Goulbourn*, Serjt., obtained a rule *nisi* for a new trial, upon the grounds that the verdict was against the evidence, and that the Lord Chief Baron had misdirected the Jury.

Denman, *Adams*, Serjt., and *Boteler*, shewed cause against the rule; and *Goulbourn*, Serjt., *Amos*, and *Pennington*, supported it (a).

Cur. adv. vult.

ALEXANDER, L. C. B.—I think that there ought to be no new trial in this case, and that the rule ought to be discharged. Upon the part of the plaintiffs at law (the defendants in equity), the occupiers, who insist on the *modus*, there was proved as clear an usage, back to the extent of

(a) The arguments are fully stated in the judgment of the Court.

about one hundred and forty or one hundred and fifty years, as I have ever heard proved; an usage not proceeding from persons who were mere occasional inhabitants on one side, or incumbents for a short time on the other, but an acquiescence, not only of incumbents, but of the person who was the owner of the advowson, and who had therefore a greater interest than usual in sustaining the emoluments of this living. It is generally only the incumbent who gives currency to the evidence of the modus; but here it is both the incumbent and the patron, for they happen to be the same person. There is also this additional circumstance, that the advowson was purchased with the knowledge of the existence of this usage, so that the present is as strong a case against the parson who makes the claim for tithes in kind, as can possibly be stated. Whenever such an usage is proved, though I know the rules of law entitle the parson to set it aside, if he can make out a proper case, it appears to me to be due to the respect that ought to be paid to ancient usage and to the possessions of mankind, to require that the evidence on which it is set aside should be quite satisfactory. I do not say that it must amount to positive demonstration, but it ought to be very satisfactory indeed, for men buy and sell according to usages established by such length of time. To set aside such an usage, so distinctly proved, the evidence ought to be extremely clear. Since I have sat in this place I have always proceeded on that principle. I have been obliged, more than once, on distinct evidence, to set aside very ancient usages, and that without even referring the question to a Jury, when I found, in authentic records, manifest evidence that there was a time after the time of legal memory, at which that usage had not prevailed. In those cases the question turned on clear expressions in ancient instruments, which could not mislead; and I was perfectly satisfied that the usage had a late commencement. Such was the *Horn-*

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church case (a); there the modus was set aside, and I think without a trial, on clear evidence of the receipt of tithe of hay in kind, coming out of the muniments of the hospital. But I repeat, that I think it is due to ancient usage, not to set it aside without very cogent evidence.

Now, the evidence in this case is directed to three points, any one of which would undoubtedly have been sufficient to set aside the usage, if the defendant had made it out. The first is, that tithes in kind had been rendered after the time of legal memory. The second is, that the boundaries of this place could not anciently be the boundaries now insisted upon. The third and last is, that the payment is rank; that is, that the circumstances shew that it is so very large a sum of money to be paid for the district for which it is pleaded, that it must have had an origin at a period when the value of money was much less than it was at the time of legal memory. I will take these as shortly as I can in succession.

The whole evidence, which is directed to the first point, viz. that tithes in kind have been paid, is the document dated in 1249, in which it appears that the *tithes* of the *Park*, as it is called, are reserved. What that document is, I am totally unable to understand. To those who see nothing but the document itself, it appears to be the instrument of persons who had no authority, and that they attempt to do that which by law no person can do. It is an allotment of the tithes of the parish to the rector, which he would have had without any allotment. The word "*tithes*" is a word of equivocal meaning, and may, according to circumstances, either mean tithes in kind, or it may mean that which is in lieu of tithes in kind, a money payment (b). Nothing, so far as I can guess the object of that instrument, required the persons penning it to direct their particular attention, in order to express, with great distinctness, what the ecclesiastical emoluments were, which the rector was

(a) *Morgan v. Tyler*, cited in *Short v. Lee*, 2 Jac. & W. 464.

(b) See *Norton v. Hammond*, 1 Y. & J. 94.

not to have. They meant only to say, that the rector shall not have those tithes, whatever they are, whether moduses or tithes in kind. It is only a prohibition and exclusion of his right to that extent. It was immaterial how that prohibition was expressed, provided the instrument pointed out the ecclesiastical emoluments, which, without that provision, the rector would necessarily have had. I think, therefore, that that view of this case totally fails, it rests on no plausible foundation whatever; for the expression is quite equivocal, and it is the only one on which this part of the case is attempted to be maintained.

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Now, the next point was, with respect to the boundaries. It is undoubtedly a rule of pleading on these subjects, that, where a modus is sought to be set up for any particular district of land, the person who insists on such modus must describe accurately the boundaries and extent and limits of the land, which, he says, are covered by the modus, because the parson must know where to go to look for his modus (a).

In this case the word park is used, and the modus sought to be established is said to be a modus covering the park of *Allesley*; and if the issue were, whether there was an ancient park at *Allesley* of the limits and boundaries set out in the pleadings, and described by the witnesses, I should think that the documents which have been used in order to disprove that part of the defendant's case, deserved the highest attention. Still I should have thought, that though they deserved the highest attention, and might have great weight in disproving the boundaries, which the occupiers were bound to make out on their part, it was a matter to be submitted to a Jury, and that the evidence produced was not conclusive on the subject. I think it would have been exclusively for their decision. The evidence respecting this part of the case rests mainly on those

(a) With respect to the certainty of district required in parochial and farm moduses, see 2 Eagle's L. T. 98 *et seq.*, 156 *et seq.* *Gillibrand v. Scotson*, 4 Price, 267.

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ancient inquisitions, of which I need not recite the expressions or the nature. They state this park to be of the extent of thirty acres. But I think the whole of this argument proceeds on a misconception. The issue is not whether there was an ancient park of the name of *Allesley Park*, of the extent and limits and boundaries described, but whether that district, which is now called, and for a great length of time appears to have been called, *Allesley Park*, is covered by the ancient modus sought to be established. It was proved that such limits exist, that they are known at this day by the name which the plaintiff gives them, and that, in point of fact, tithes in kind have never been rendered for these particular lands, and that they have been protected by the modus in question. Thus the plaintiff has made out all that is incumbent on him, the issue not being whether there is an ancient farm or an ancient park called *Allesley Park*; but whether this district, which now appears to be called *Allesley Park*, was covered by such a modus. That is proved by shewing actual boundaries, and by shewing that, within those boundaries, no tithes in kind were rendered, but that it was protected by this payment of *3l. 6s. 8d.* I think the whole of that argument proceeds on a misconception of that which is the real issue between the parties. It is not enough to say, that all this may be a mistake; I think it must be shewn that it is a mistake, in order to authorize us to set aside this ancient usage: and if I were to conjecture about it, I should conjecture that the whole of the demesne lands formerly in the hands of Lord *de Hastings*, or of those persons to whom he succeeded, had been covered by this payment; and that, though the smaller district might, *de facto*, have been turned into the form of a park, the whole district which was covered, originally or by degrees acquired that name. That conjecture seems to me to be quite a sufficient answer to all the documents that have been produced. Many important observations arise upon the face of the documents, but I do not think it is at all necessary to enter into those obser-

uations. Many circumstances concur in making me think that those documents were very inaccurate descriptions of what they purport to describe. There are one or two instances in which I myself had evidence of their being extremely inaccurate, but I do not think it necessary to go into this question after what I have stated with respect to the nature of the issue between the parties on this record.

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Then the next question is, whether this is a rank modus. Now, upon the question of rankness, many of the documents used on the other subject of the boundaries, have been brought to bear; and they have certainly some effect, and much attention is due to the argument that is used with respect to them. On this subject all Judges, I believe, have agreed, that it is not to be weighed in very nice scales; it has often been said, that it may have been worth while for an individual, or a great lord, to give a great deal more than the value of the tithes, in order to be rid of the annoyance which that right sometimes introduces. But, at the same time, there must be limits to this observation. I think the observations which I have made already on the question of the boundaries, shew very clearly what affects my mind on this subject. The argument for the rankness, depends very much on the small limits which are supposed to be covered by this modus; but, as I am not satisfied that there is any evidence to shew that the limits were so small as is alleged, and as I think that they may have been (which is enough for my purpose,) much more extensive, I think that the argument of rankness entirely fails. The same observations will be an answer to the arguments arising from the bailiff's accounts. Those are accounts which relate to a park only; but if I consider this modus as covering a more extensive district than that which is strictly the park, there is an end of all the arguments from these documents, for undoubtedly they refer only to the park. I think, therefore, upon the whole, that no case sufficiently strong has been made before the Court, to satisfy

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me that this is a bad *modus* on any of the grounds contended for; and I therefore think, that we ought to support this ancient usage, which was proved to have existed for nearly one hundred and fifty years, under the strong circumstances which I have mentioned. I am therefore of opinion, that there ought to be no new trial. I think too, that I ought not to consider whether I made exactly the same observations to the Jury in this case, which I should have made, if I had had the benefit of such an extended argument as I have since heard. I think it enough for me to feel that whatever observations ought to have been made, the Jury might very reasonably have come to that conclusion to which they have in fact come; and, if I am satisfied of that, I ought not to give to the party a new trial. My opinion is, therefore, that this rule must be discharged.

BAYLEY, B.—I concur entirely with my Lord Chief Baron, that the rule in this case ought to be discharged. The issue was, whether that which now passes by the name of *Allesley Park*, and which contains three hundred and twenty-seven acres, is or is not covered by a payment of *3l. 6s. 8d.* a-year, payable at a given period in that year. How long that which is now called the park has had that appellation attached to it, or whether the whole or any part originally passed by that name, we have no means of forming any opinion; but, for the last one hundred and thirty or one hundred and forty years, namely, from the time of the conveyance which was proved, it has had the name of *Allesley Park*, and has comprehended the whole district which is the subject in dispute; but whether the whole of that was in very ancient times what may be denominated a park, or whether in very ancient times a portion of it only might have been a park, and the rest of it might be considered as forming the park estate, owned with the park, and probably, at the same time, occupied with what might strictly be called park property, is a question as to which the evidence is doubtful. The case

has been decided by a Jury, and the reason for which we are required to send it down again to another Jury, is, that there are ancient documents, from which documents it is supposed the Jury have drawn a conclusion, which they ought not to have drawn.

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I think, when we look carefully and minutely at many of these documents, it will be found that they are not entitled to the weight which my brother *Goulbourn*, and the counsel on his side, in support of the rule, seem to think they are entitled to receive. But whatever be their weight, unless we can see satisfactorily, either that the weight of evidence preponderates against the verdict, or that some plain ground is furnished by such documentary evidence, which would satisfy us that the verdict of the Jury is not a right verdict, or unless there had been some misdirection on the part of my Lord Chief Baron, who tried this cause, we ought not to grant a new trial.

In this case, there are three points made, and the questions arise, *first*, has this payment been made beyond the time of legal memory? *Secondly*, has it been made for and in respect of these three hundred and twenty-seven acres? And *thirdly*, is it or is not so disproportionate to what may be supposed to have been the value of the tithes of this district, at the commencement of legal memory, as to be unavailable on the ground of rankness. These are the three points for consideration.

In order to make out that the payment did not commence until after the period of legal memory, a document of the date of 1249 is relied upon, and that is the only document, and the only piece of evidence in the case, from which payment, within the time of legal memory, of tithes in kind, is attempted to be inferred, perhaps, with the single exception of an observation which may be made on the bailiff's accounts. Now, when we look at this instrument on which my Lord Chief Baron has fully commented, what is it? Not an instrument to which the patron, the Lord *Abergavenny*, or the Lord of the Manor, or the owner of the

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estate in question, is a party. It is an instrument by which certain persons, professing to act as commissioners for the priory and convent of *Coventry*, take upon themselves to assign to the rector of *Allesley*, all the tithes and oblations belonging to that church, with an exception. From the language in which that exception is couched, it is supposed that we are bound to infer, that the tithes in kind were payable at that period, and that, in his observations to the Jury in that particular, my Lord Chief Baron was incorrect, his observations in that respect being, that the word "tithes" in that instrument, did not of necessity import tithe in kind, but might be satisfied with that customary payment (if that customary payment at that period existed) which subsisted in lieu of tithe. In judging what meaning is to be attached to a particular instrument, whether of ancient or of modern date, it is material to consider what information the persons who speak by such instrument may be likely to have on the subject, and how far they would be likely to confine themselves to the most accurate language. Now, all they say in this case is, we give you every thing else, but there is one subject on which we do not act, we leave the question of tithe of the park of *Allesley* as we found it. Does that of necessity mean, that tithe was payable in kind? If for 60 years before that period there had been a bargain by which the money payment of 3*l.* 6*s.* 8*d.* was to be paid in lieu of tithe of this park, it would be natural to use this word "tithe," because it was not material in that document, that they should distinguish whether the tithe was payable by a money payment, the manner of payment of the tithe being perfectly immaterial to the object with which that exception was introduced.

The next document that was relied on, was a document of the date of 1279, the object of which was to satisfy our minds, that the payment, though it might have been immemorial, was not made for the 327 acres, but for a much

less quantity, because *Allesley Park* is in that document described as containing 30 acres, and 30 acres only. Whether that be an accurate description of the quantity of land which at that period was considered as constituting *Allesley Park*, or whether, by "the acre," at that period, was meant the same quantity which is denominated by an acre now, we do not know. I think the true answer to this document, in the attempt made to apply it to the present case, is this, that there might be a park of 30 acres, and of 30 acres only at that period of time, but that such park did not constitute the full extent of those limits for which the 3*l.* 6*s.* 8*d.* was paid, but that it constituted a part, and a very inconsiderable part, of the land covered by this payment. I therefore think that this document does not furnish a satisfactory ground for believing, that at the time in question, the land which was covered by the payment now under consideration, consisted of 30 acres, and of 30 acres only.

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The bulk of the residue of the evidence will be found in a great degree to apply to the question of rankness. Now, on the question of rankness, it is to be observed, that this is a *farm modus*, covering a large portion of land. It is a *modus* in which the patron of the living is one of the parties, and it is not very improbable, that the patron of the living, who was to protect his land for all periods of time, and who was to have the power of conferring that living upon the personal object of his consideration, should, with a view to perfect the future security of his estate, make a fair and liberal compensation to the rector of the parish. It is not improbable, that, under such circumstances, he should be liberal as to the amount of the money to be given by way of *modus* or compensation for the tithe. Besides, on calculation, the sum does not amount to quite 2*d.* *per* acre; which is certainly not a large *quantum per* acre. There have been *moduses* attempted to be established, in which the sum *per* acre was much larger, and

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I believe a farm modus has been actually established (and a distinction has been from time to time made between farm moduses and others, allowing a greater degree of liberality in respect of farm moduses (a)), in which 1s. *per* acre was not considered as being too high (b). You cannot, therefore, predicate of a farm modus, that it must of necessity be too high, when it is 2½d., or 2¼d. *per* acre.

In order to satisfy the Court that there could not have been an immemorial payment of 3l. 6s. 8d., *Pope Nicholas's Taxation* is relied upon; and it is said, that the payment bears so large a proportion to the value of the whole tithe, being five marks, and the whole tithe being described in *Pope Nicholas's Taxation* as of the value of twelve, that it is impossible to suppose that this money payment could have been made at the time in question. That of course was a matter of observation, and for the consideration of the Jury. The Jury would have to consider on the one hand, whether they were satisfied that, in that particular, *Pope Nicholas's Taxation* was or was not correct, and whether it did or did not truly and accurately state the full amount of money which was the value of the living in question. That was a question for them; and perhaps, if they had drawn a contrary conclusion in this case, I might not, in any respect, have been dissatisfied with it. But, *Pope Nicholas's Taxation* is, as it seems to me, one of the strongest grounds against the present verdict, and that having been submitted to the consideration of the Jury, without any observation which would in any respect impeach the conclusion to which the Jury came, it does not furnish any material ground on which the present verdict can properly be set aside.

(a) The distinction between a farm modus and a modus for specific articles, is established and recognized by the older decisions, and although subsequently disregarded by the Court of Exchequer,

is now fully settled by a long series of decisions. See Eagle's L. T. 189, 190.

(b) *O'Connor v. Cook*, 6 Ves. 665; 8 Id. 535.

The *Nonæ Rolls*, and the *Ecclesiastical Survey*, are open to pretty nearly the same observation. The *Nonæ Rolls* followed the taxation of *Pope Nicholas*, and the *Ecclesiastical Survey* puts the value of the property in question at about 17 marks and a fraction, raising it considerably higher certainly than it was in *Pope Nicholas's Taxation*. There were two or three inquisitions about that time, which were presented to the consideration of the Jury, from which it was inferred, that the value of the property in question was so inconsiderable at that period, that it is impossible there could have been 3*l.* 6*s.* 8*d.* payable by way of composition for the tithe. Now, as to that, when we look at the value which is put on the amount of the property to which these inquisitions refer, it certainly appears, that, in several instances, they put the value so low, that, I am not surprised that a Jury should consider those inquisitions as not furnishing safe and solid grounds on which they were to act.

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The bailiff's accounts were materially pressed upon our consideration, and I think they admit of plain and easy answers. They were adduced for the purpose of satisfying the Court, that, from the rents with which the bailiff charged himself, it was improbable that the whole property would, at that period of time, have been of such an amount, as could in any respect make 3*l.* 6*s.* 8*d.* a reasonable compensation for the tithes; and they were adduced also, for the purpose of implying, that if the sum of 3*l.* 6*s.* 8*d.* was at that time payable, it was to be expected that the bailiff, in discharging himself in his account, would have taken notice of the payments in discharge of that sum of money. Now, in the first place, when we look at the bailiff's accounts, with what does the bailiff debit himself? He debits himself with 8*l.* 3*s.* 4*d.* for the farm and the agistment of the park. Now, the first question I would ask on that is, what was the extent of that park? Was it the whole 327 acres, or not? On that this document is perfectly silent; it might be that park which had been

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mentioned in the early inquisition as being 30 acres, and of much smaller dimensions and extent than that which now has acquired the name, and passes by the name of *Allesley Park*, containing 327 acres. Therefore, we are at a loss to know, in these bailiff's accounts, what was the extent of the agistment of the park. Well, then, what is meant by the agistment? Does that give to the tenant the full possession of the land, the sole and exclusive occupation, with all the pasturage and all the privileges? or does it merely give him, at certain periods of the year, the power of turning in his cattle, and feeding them on the grass? Is the whole of it, in the first place, in pasturage? Is there to be no hay made? Is the lord to be excluded? All that would depend on the bargain which the bailiff from time to time made on behalf of his lord with the person to whom the agistment was given. The agistment may imply, that the lord is to have his hay, that the lord is to be at liberty to turn in cattle of his own; but that, subject to the lord's rights in these respects, the tenant, or person to whom the agistment is let, shall have the power of turning in and taking cattle of other persons. Now, considering the loose language in which the agistment of the park is mentioned, and without knowing what was meant by the park at that period of time, these bailiff's accounts do not seem to me to furnish any ground which enables me to say distinctly for what that sum of 8*l.* 3*s.* 4*d.* was paid. But it is said, that if this payment was at that time made, it is natural to expect that the bailiff would have discharged himself by shewing that he had made that payment; that, however, would depend on this, whether he was to be the hand by which the payment was to be made. It might be, that the person to whom the agistment was let, might, by the bargain, be the person to pay this 3*l.* 6*s.* 8*d.*, or it might be, that the receiver, to whom the bailiff from time to time made his payments, was the person by whom the 3*l.* 6*s.* 8*d.* was to be paid; for it will appear, that, in every one of those documents, there is a

balance paid by the bailiff to the receiver, and it is quite as natural to suppose that the receiver would be the person by whom this 3*l.* 6*s.* 8*d.* was to be paid, as that it should be paid by the bailiff.

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Having made these observations with respect to the effect of the bailiff's entries, I believe I am now brought to the consideration of the leases in the time of *Edward* the 6th, and of *Philip* and *Mary*, and the conveyance or mortgage for 600*l.* Now the lease is at a rent of 20*l.* *per annum*, but whether any fine was paid for that, is a point which we are totally at a loss to know. The lease itself is not produced, and we are ignorant what lands it comprehends.

The second lease, which was granted at 40*l.* a-year, is a lease granted in consideration, not only of that rent, but also of a certain sum of money to the said Lord *Abergavenny*, in his need disbursed; what proportion, therefore, might be paid by way of fine in order to get that lease, is a point on which this evidence leaves us entirely in the dark. The extent of what is granted by that lease, depends on what was the extent of the inclosed park at that time: whether that did or did not include the 327 acres, or whether it applied only to a limited district, is a point on which the evidence of the case leaves us entirely, as it seems to me, in the dark. And I think, in that respect, it does not furnish a ground on which we can safely act. The conveyance is a conveyance by way of mortgage, in consideration of the sum of 400*l.* lent; and there is a stipulation for the payment of 200*l.* more, if Lord *Abergavenny* shall not make his payment within the period of time, within which, according to the stipulation in the mortgage, it was required he should make it; and in that event the mortgagee is, on the payment of 200*l.* in addition, to be entitled to claim a conveyance of the estate. Now, what is it that this instrument passes? If that applies to the whole 327 acres, I admit that it would be a strong document against the present verdict, for it would shew that, at that

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period of time, 600*l.* was considered as being the full value of the property in question. But it seems to me to admit of a fair matter of doubt, whether it does apply to the whole of the 327 acres or not. I am of opinion, therefore, that that instrument does not furnish any solid, safe, or satisfactory ground, on which we can say, that this verdict ought to be disturbed.

Looking at all the documents, it seems to me, that nothing furnishes any thing like a substantial ground for questioning the propriety of the present verdict, except the taxation of Pope *Nicholas*, where the value of the whole living is described as being twelve marks, the *Nonæ Rolls*, the *Ecclesiastical Survey*, and this mortgage. They do not, however, as it seems to me, furnish any satisfactory ground upon which we can approach to any thing like certainty that the present verdict is wrong, or that a different jury ought not to come to a similar conclusion, or that a contrary conclusion would be one which would ultimately decide what would be just between the parties. I am therefore of opinion, that this rule ought to be discharged.

GARROW B.—I entirely agree with all the reasoning which has been delivered by the Lord Chief Baron, and my brother *Bayley*, on the several documents, and on the evidence which has been submitted to the Jury; and I concur with them in thinking, that this verdict ought not to be set aside, and a new trial granted.

VAUGHAN, B.—Having listened with earnest attention to the very able arguments that have been addressed to the Court in support of this rule, and having also listened to the elaborate judgments given by my learned brothers who have preceded me, I am of opinion that this rule ought to be discharged. I do not regret that this has been made the subject of much discussion, because it is not enough mere-

ly that justice should be administered between the parties, but it is desirable that it should be administered according to their just and reasonable expectations.

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This is an issue directed by my Lord Chief Baron, for the purpose of informing his conscience, and with a view to assist him in administering that relief, to which the parties to the bill may ultimately appear to be entitled. I take it to be clear, that it was competent to my Lord Chief Baron to have assumed to himself, if he had been so disposed, the determination of every matter of fact suggested by this record; but it has been the practice, more especially of late years, (for I believe it has been much more frequent of late years than in earlier times), to send these matters to the consideration of a jury, whenever a reasonable doubt is suggested (a).

It will be remembered, however, that the point to be decided on this issue is a pure matter of fact: the issue being, whether a certain tract or district of land, comprising about 327 acres, called *Allesley Park*, was or was not covered by a modus or money payment of 3*l.* 6*s.* 8*d.* (b).

Now, that issue involved two propositions of fact: the first related to the identity of the land, because it certainly was incumbent on the plaintiff to shew that the modus applied to the particular lands which were referred to in the proceedings in equity. It was necessary to shew that these particular lands were the subject of this money payment. It was then also necessary to shew further, that this payment had existed from time immemorial. The affirmative of that issue was upon the plaintiff at law, the defendant in equity, and being on him, it was incumbent on the plaintiff, beyond all question, to make out these two propositions to the satisfaction of the Jury.

(a) See, upon this subject, 2 Eagle's L. T. 377 *et seq.*, and the cases there cited.

(b) Rankness in a modus is an objection of fact, and not of law. See 2 Eagle's L. T. 185 *et seq.*

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Now, let us see in what manner that has been established in this issue. As it seems to me, it has been established in the only way in which it could be established, affirmatively and negatively—negatively, by shewing that no tithe in kind had ever, in the memory of the oldest witness that was called, been paid; and affirmatively, by shewing that this money payment had been made uniformly without interruption for a long succession of years, extending, according to the evidence, beyond all question, if not as far back as 1692, certainly as far back as 1698. This appears to me to differ from the cases that have generally fallen within my experience, for I must say I never, in the whole course of my experience, saw any proof so strong, so clear, so cogent, I had almost said, so irresistible, as that which was adduced in this case. From the fact of this payment having been made for the period during which it was proved to have been made, namely, for 180 or 140 years, the Jury would be called upon to conclude that it had existence beyond the time of legal memory, unless there was the most distinct, clear, and satisfactory evidence to prove the origin of that payment within a later period.

With respect to the boundaries, it does not appear to me that there was any contradictory evidence; for it must be remembered, that the issue was not what was anciently the limit of *Allesley Park*, properly so called, but what was the limit of the district known by the name of *Allesley Park*, for which this payment had been made. Now, as has been observed, it is perfectly consistent with the plaintiff's evidence that the park might anciently have consisted of thirty acres only; and still it does not follow that this payment might not anciently have covered a much larger portion of land.

Supposing it to be reasonably made out, that this payment applies to the district called *Allesley Park*, of the extent of 327 acres, is it then to be inferred that this

payment is too large under the circumstances? In other words, is this a rank modus? The amount is about $2\frac{1}{4}d.$ an acre. The documents relied on are, *Pope Nicholas's Taxation*, the *Ecclesiastical Survey*, the *Nonæ Rolls*, and the bailiff's accounts. These are the materials on which the defendant relies to negative the presumption that this payment had continued immemorially. If the Jury should be of opinion that the payment existed from time immemorial, rankness would be out of the question. If the payment be very high, it is strong evidence, and furnishes a presumption and an inference that it is not immemorial. If, on the other hand, the payment is what appears to be extremely low, that again should enter into the consideration of the Jury. The subject of rankness has been brought under discussion in many cases (a). There are two to which I will particularly allude. In the case of *O'Connor v. Cook* (b), a farm modus was insisted on of 20*l.*, covering 400 acres; that was a shilling for every acre. When it came to be discussed before the Lord Chancellor, he thought it was extremely large, and it was pressed upon his Lordship—Why will you send this down, it is only sending it to the prejudice of the Jury? Lord *Kenyon*, when at the Rolls, having been supposed to have said, on one occasion—It is not sending it to the judgment, but to the prejudices of the Jury. The Lord Chancellor said, I cannot so speak of the constituted tribunals of the country: Juries are appointed to decide on such questions; they deliver their judgment under the obligation of an oath, and according to their consciences; therefore, I shall send this question down to them, whatever may be my opinion of the amount of this payment. The Lord Chancellor, impressed with a notion that it was a very large modus to insist on, sent it down; and the Jury established the modus. There was a motion for a new trial, in

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(a) See the cases collected in 2 Eagle, L. T. 185 *et seq.*
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which it was contended, that the learned Judge who tried the cause had not paid that attention, and had not given that weight to the taxation of Pope *Nicholas*, to which it was entitled. It is very much to be lamented that different Judges attach such different credit to this document. I never heard one hold it to be conclusive on the question; some have treated it with less respect than others; but in all instances where it has been laid before the Jury, it has been left for the Jury under the circumstances to decide upon. It was also said, that further evidence had been discovered; and my Lord Chancellor sent it down to a second inquiry, thinking, undoubtedly, the payment was very large; but on the ground that it was a question whether the district covered by the modus was not a part of another hamlet, and, therefore, whether it might not extend to a larger district than the 400 acres. It went down a second time, the Jury were of the same opinion as the former Jury, and they affirmed this modus of 1*s.* per acre. Upon this, a third application was made to the Lord Chancellor, which he rejected, and affirmed the modus(a). It had been decided by the tribunal which was competent to decide it; it was a matter of fact; there was no imputation against the Judge that he had not done his duty; the verdict stood; and a decree was made upon it.

There is another case, of *Fermerv. Loraine*(b), which was a farm modus, insisted on to cover about 200 acres of land, and which, I think, amounted to about 7*d.* or 8*d.* an acre. It was the case of the vicarage of *Normanton*, in *Leicestershire*. There the question of value introduced the taxation of Pope *Nicholas* and the *Ecclesiastical Survey*; and one party undertook to demonstrate, that the tithes had been taken in kind. For that purpose a lease, in the time of *Charles* the 2nd, of the tithes, was produced, and there was a discussion upon the question, whether

(a) 9 Ves. 168.

(b) Not reported.

a lease of the *tithe* would not be the proper mode of demising them, even if covered by a modus. That argument was pressed upon the Court. The Jury having found a verdict for the rector, an application was made for a new trial. A new trial was granted, the cause went down a second time, and the Jury found for the church again. Another application was made for a new trial, and then the parties compromised it; but it was twice tried. That was a case of a verdict accordant with the opinion of the Court; and notwithstanding those documents, the evidence being very strong on the subject of the modus, the Court granted a new trial. Under these circumstances, therefore, my mind is not at all embarrassed with the consideration of rankness; for this modus may have existed from time immemorial, though it cover a district of 327 acres, amounting, as it does, only to *2*^{*1*}/₂ an acre. A distinction, in all cases, has been taken between what is called a farm modus, and a modus for a particular article, where you may, by reference to books, ascertain pretty much what the value of the particular article was at the time. I am not sure that twelve men may not honestly differ in the inference to be drawn from the evidence on the one side and on the other; but that is not enough, unless we can see distinctly, that injustice has been done, and that the Jury have come to a wrong conclusion. In the present case, not seeing that the Jury have come to a wrong conclusion, I am not prepared to say, that their judgment ought to be reversed. Under these circumstances, I agree that the rule ought to be discharged.

Exch. of Pleas,
1831.

BECK
v.
BELL.

Rule discharged.

Exch. of Pleas,
1830.

GENERAL RULES.

OFFICERS OF THE COURT AND THEIR FEES.

Fees of the
sworn and side
clerks.

IN pursuance of an act passed in the first year of his present Majesty's reign, intituled "An Act for the more effectual Administration of Justice in England and Wales (a)," It is ordered by the Court, that the several fees hereunder mentioned shall and may continue to be taken by the sworn and side clerks of this Court, the same being for duties to be performed by them as officers of the Court, similar to the duties of the other superior Courts. And it is further ordered, that, in the taxation and allowance of costs, such fees shall be distinguished from, and form no part of the fees and charges which shall be allowed to the attornies who have been, or shall be, admitted to practise under and by virtue of the said act, but the same shall be allowed as disbursements.

The Fees above referred to.

[These fees are exclusive of the Master's fees.]

On process of <i>subpœna ad respondendum</i>	. .	0	1	6
Filing affidavit of service of <i>subpœna</i>	. . .	0	1	0
Attachment for not appearing to <i>subpœna</i>	. .	0	1	6
<i>Alias</i> and <i>pluries</i> attachment, each	. . .	0	1	6
One appearance in the paper book for one defendant	0	1	0

(a) 1 Wm. 4, c. 70, s. 10, enacts, "That it shall be lawful for the Barons of the said Court, [of *Eschequer*], and they are hereby required, to distinguish, by their rules and orders, the fees which shall continue to be taken by the sworn and side clerks of the Court, for the duties performed as officers of the Court, similar to the duties of the officers

of the other superior Courts, from such fees and charges as shall be allowed to be taken by the attornies so admitted to practise, so that the amount of such fees and charges, upon the whole, do not exceed the amount and rate of such fees and charges as are now allowed upon the taxation of costs."

For every additional defendant	0	0	4
On special bail and filing	0	4	4
For taking bail off the file to produce in Court	0	1	0
Filing all affidavits, (not excepted by act of Parliament), <i>postea</i> s, and inquisitions	0	1	0
Searching for all writs, affidavits, and processes, each time, <i>per</i> Term	0	0	4
Searching for judgment and all matters of record, <i>per</i> Term	0	0	4
Office copies of all affidavits, and other matters of record, <i>per</i> folio	0	0	8
Office copies of all rules, <i>per</i> folio	0	0	4
On taking all pleadings out of the office, <i>4d.</i> <i>per</i> folio, according to the number of folios marked on the pleading by the party filing the same, <i>per</i> folio	0	0	4
On filing declarations	0	0	4
Enrolling deeds and other matters requiring to be enrolled, <i>per</i> folio	0	0	4
For every warrant of attorney	0	0	4
For entering every rule	0	0	4
For drawing, and copy of every order of Court, <i>per</i> folio	0	0	8
For exemplifying a record, <i>per</i> folio	0	0	4
For entering a <i>certiorari</i> out of Chancery	0	3	4
For acknowledging satisfaction on record	0	4	8
For every release	0	2	0
For entering an <i>audita querela</i>	0	3	4
For attending every trial at bar	1	0	0
For every exhibit read at a trial at bar	0	1	0
For entering all proceedings on writs of error, <i>per</i> folio	0	0	4
For enrolling writ of error	0	6	8
For office copies of all pleadings, when required, <i>per</i> folio	0	0	4
For each writ of <i>supersedeas</i> on an attachment	0	1	0

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Duties of the
sworn and side
clerks.

That the several duties for which fees are appointed in the said schedule, shall be performed by the sworn and side clerks of the said office, or their sufficient deputies or deputy, on the request of the persons now or hereafter admitted to practise as attornies in this Court, within the hours and times hereinafter appointed, whereupon such fees as aforesaid shall become payable (a).

Duties of the
master.

That the several duties heretofore performed by the clerk of the pleas or his deputy, at the instance of the sworn or side clerks of the office of pleas, shall hereafter, at the instance of, and for the attornies admitted as aforesaid, be in like manner performed by the said clerk of the pleas, or his deputy, on payment of his lawful fees for the same (b).

Office hours at
Exchequer
office.

That the said office of pleas shall be kept open for business every day, (*Sundays, Christmas Day, Good Friday, Easter Monday, Ascension Day, and Midsummer-day*, and days appointed for public feasts, thanksgiving, or fasts, excepted), from the hour of 11 in the morning till 3 in the afternoon, and from 5 o'clock in the afternoon till 9 o'clock at night, during Term, and for sixteen days after an issuable Term, and for ten days after a non-issuable Term; and at other times till seven o'clock in the evening.

Appointment of
attornies, ad-
mitted, to sue
and defend, in
actions pre-
viously com-
menced.

That in all actions, which, before the first day of this present Term, were pending in this Court, the parties, plaintiffs or defendants, shall and may be at liberty to apply to one of the Barons of this Court, for an order appointing any person who shall then be an attorney (c) of this

(a) For the duties of the sworn and side clerks of the *Exchequer*, see Dax's Practice of the *Exchequer*, and 1 Burton, 11—16.

(b) For the duties of the master or clerk of the pleas, or his deputy, see Dax's Practice of the *Exchequer*, and 1 Burton, 5—11.

(c) By stat. 1 Wm. 4, c. 70, s.

10, it is enacted, "That all persons admitted or admissible to practise as attornies in the Courts of *King's Bench* and *Common Pleas*, shall be admissible in like manner as attornies of the Court of *Exchequer*, and be admitted and allowed to practise there as such, upon application to the Barons of that Court,

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Court, to be his or her attorney, in further prosecuting or defending such action, upon undertaking to pay the sworn

without being obliged to employ any clerk in court in the capacity of attorney of the Court of *Exchequer*, any law or usage to the contrary notwithstanding."

To obtain admission as an attorney of this Court, an attorney of the *King's Bench* or *Common Pleas* must take his admission in those Courts to the chambers of one of the Barons of this Court, who, if he think fit, will grant a *fiat*, directing the master to swear, admit, and enrol him. The attorney must then make an affidavit, on stamped paper, stating, that the proper duty imposed on articles of clerkship, was duly paid on certain articles, bearing date on &c., and made between &c, and that the articles were executed on the day of the date by all the parties, and were duly enrolled in the Court of *King's Bench* or *Common Pleas*, on the — day of —, as appears by the certificate of the proper officer thereof, and that the deponent was admitted an attorney of his Majesty's Court of [*King's Bench* or *Common Pleas*] at *Westminster*, on the — day of —, and has ever since continued, and now is, on the rolls of the said Court. The *fiat* and affidavit must be left at the *Exchequer* office, the evening before the attorney is sworn, and on the following morning, at the sitting of the Court, the attorney must attend to be sworn, and, having been sworn, must sign the roll.

By the same stat. s. 17, "All attorneys and solicitors now actually

admitted and practising in any of the said Courts of Sessions or Great Sessions, may be admitted as attorneys of the said Courts at *Westminster*, in like manner as is now, or may be hereafter prescribed for the admission of other persons as attorneys therein, upon payment of such sum for duty, in addition to the sum already paid by them in that behalf, as shall, together with such latter sum, amount to the full duty required upon admission of attorneys in the said Courts at *Westminster*; and that all persons having served, or now actually serving, under articles as clerks to such attorneys or solicitors of any of the said Courts of Sessions or Great Sessions, may, at the expiration of their respective times of service, be admitted as attorneys of the said Courts at *Westminster*, in like manner, and upon payment of the like duty, as if they had served under articles as clerks to attorneys of the last-mentioned Courts."

And by the same stat. s. 16, "All persons, who, on or before the passing of this act, shall have been admitted as attorneys, and shall then be practising in any of the Courts of Sessions or Great Sessions in the county palatine of Chester, or in Wales, respectively, shall be entitled, upon the payment of one shilling, to have their names entered upon a roll to be kept for that purpose in each of the superior Courts of *Westminster*, and thereupon be allowed to practise in such Courts in all actions and suits against per-

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or side clerk previously employed by him, his costs incurred in such action, to be taxed, if required, by the master, and that service of such order on the opposite party or parties, or his or her attorney, shall be sufficient notice to him or them of such appointment.

PRACTICE.

Of the *præcipe*
and indorsement
of the attorney's
name on writs.

IT IS ORDERED—That henceforth the name and address of the attorney issuing any writ (*a*) shall be indorsed or written thereon; and also that the day, month, and year, in which the same shall be issued, shall be indorsed or written on all writs hereafter to be issued in the office of pleas of this Court; and if the same be *mesne* process, other than a writ of *subpœna ad respondendum*, a *præcipe* or particular of such writ, containing the county into which the same shall issue, the names of every party, plaintiff and defendant therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be so issued, shall be delivered to the clerk, or deputy clerk of the pleas, on his being required to sign such writ, which *præcipe* shall be duly filed on files, to be provided by the said clerk of the pleas, or his deputy, for each Term and vacation, according to the county into which the same shall be issued; and

sons residing, at the commencement of the suit, within the county of *Chester* or principality of *Wales*; and that all persons having served, or now actually serving, as clerks to such attornies under articles, and who would otherwise be entitled to be admitted as attornies of the said Courts of Great Sessions, may, on or before the expiration of six months after the passing of this act, be admitted as attornies of the said Courts at *Westminster*, for the pur-

pose of practising there in the like matters only, without payment of any greater duty than would be now payable by law upon their admission as attornies of such Courts of Great Sessions respectively."

(*a*) For an account of the various writs now used in the Court of *Exchequer*, see 1 Manning's Practice, 7 *et seq.*, Burton's Practice, Dax's Practice of the *Exchequer*, and Carrington's Rules and Orders, 19—26.

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if such process be *subpœna ad respondendum*, and process of contempt thereon, and writ of *supersedeas* thereon, a *præcipe* shall in like manner be left with the sworn or side clerks, or their deputies, in the office of pleas, containing the names of every party, plaintiff and defendant, therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be issued, which shall be kept on a similar file by the sworn and side clerks, to which *præcipes* any attorney of this Court, or his clerk, shall have access, on payment of the fee payable in respect thereof.

That a copy of all process of *subpœna ad respondendum* hereafter to be issued out of this Court, and of any indorsement thereon, shall be served; and no service thereof shall be effected, as heretofore, by service of any label or other minute thereof (a). Service of subpœna.

That where there are more than four defendants in a joint action to be commenced in this Court, residing in the same county, the whole number of such defendants shall be named in one writ: and if the whole number of defendants shall appear by the same attorney, and at the same time, the names of all the defendants shall be inserted in one appearance. Joinder of several defendants in one writ, and appearance.

That all recognizances of bail in actions in the said office of pleas, when taken or allowed by a Baron, shall be left by the attorney for the defendant or defendants, with the sworn or side clerks, or their deputy, in the office of pleas, until duly allowed, who shall enter the same in a book to be kept by them for that purpose, having an alphabetical index of reference; which book shall be open Recognizance and notice of bail.

(a) The *subpœna ad respondendum* must formerly have been signed by the chief secondary, or a sworn clerk in the office of the King's Remembrancer, but it has been decided that the rules in this respect

(Hilary Term, 19 Jac., *Michaelmas* Term, 36 Car. 2), are obsolete, and that this process may now be issued out of the office of pleas. *Taylor v. Riley*, 9 Price, 389.

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to the inspection of the attornies so admitted as aforesaid, or their clerks; and notice of such bail being allowed and left and filed in the said office of pleas, with the names, descriptions, and address of the bail, shall be given by the attorney for the defendant or defendants, to the attorney for the plaintiff or plaintiffs, within the times prescribed for giving notice of bail by the former rules of this Court (a); and proceedings may be thereupon had for excepting to and perfecting such bail, within the times and in like manner as is and are prescribed by the existing rules and practice of this Court, except so far as the same may be altered by the present (a), or any subsequent rule of this Court.

Appearances.

That on every appearance to be entered by the sworn or side clerks, as officers of the said office of pleas, they

(a) By a general rule of *Trinity* Term, 26 & 27 Geo. 2, it is ordered, "That, from and after the first day of *Michaelmas* Term, 1753, in every action in this Court, where special bail is put in before the Barons of this Court, the plaintiff may except thereto within twenty days next after the putting in of such bail, and notice thereof given in writing to the plaintiff, his attorney, or clerk in court; or where special bail is put in before any commissioner, the plaintiff may except thereto within twenty days next after the said bail is transmitted to and allowed by one of the Barons of this Court, and notice thereof given in writing, as aforesaid. But no exception to bail shall be admitted after the time hereinbefore limited; and in case exception shall be taken to the said bail within the time aforesaid, and notice of such exception shall be

given in writing to the defendant's attorney, or clerk in court, the defendant shall perfect his bail, and justify the same, if the notice be given, in term time, within four days after such notice; [but if exception be taken in vacation time, and notice thereof given in like manner, the said defendant shall perfect his bail and justify the same upon the first day of the subsequent term, unless the plaintiff, his attorney, or clerk in court, shall consent to a justification before one of the Barons of this Court; in which case the said bail shall justify themselves before one of the Barons, within four days after notice of such exception in writing given to the defendant, his attorney, or clerk in court]; and in default of the defendant's justifying his bail [in either of the said cases], the plaintiff shall be at liberty to proceed on the bail bond."

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shall cause to be put the name and address of the attorney at whose instance, and the day on which the same shall be entered; and such appearance shall be entered by the defendant's name, by the said sworn clerks, in proper books, having an alphabetical index book of reference, entered by the plaintiff's name, to be provided by the clerk of the pleas for each term; which books shall be open to the inspection of the said attornies, so admitted as aforesaid, and their clerks, without fee or reward (a).

That all declarations *de bene esse* shall be filed with the sworn and side clerks, or their deputy, and shall be entered in alphabetical order in proper books for each term, to be kept by them for that purpose; which books shall, at all times within office hours, be open to the inspection of the persons admitted to practise as attornies of this Court, and their clerks, without fee or reward; and the declaration so filed shall and may be taken out of the office by the defendant, or his attorney, upon payment of the fees payable in respect thereof (b).

Declarations *de bene esse* must be filed.

That service of all pleadings, summonses, orders, rules, notices, and other proceedings, heretofore served on the sworn or side clerks, at their seats in the said office of pleas, shall hereafter be served upon the attorney or attornies of the adverse party or parties, by delivering the same to, or leaving the same for him, in the manner hereinafter mentioned; and that henceforth no entry of any notice shall be required to be made in any book to be kept in the said office of pleas as heretofore.

Service of pleadings, &c.

That the clerk of the pleas, or his deputy, shall forthwith cause to be prepared, a proper alphabetical book for the purposes after-mentioned; and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any such attorney as aforesaid, or his

Attornies to enter name and place of abode in book.

(a) As to the time within which appearances must be entered, see Dax's Practice of the *Eschequer*, 1

Man Pract. 41, 46, 47, 57, 96, and Car. R. & O. 29.

(b) See *post*, p. 279.

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clerk, without fee or reward; and that every attorney admitted in this Court, and residing in London, or within ten miles of the same, shall forthwith enter in such book, in alphabetical order, his name and place of abode, or some other proper place in London, Westminster, or the Borough of Southwark, or within one mile of the said office, where he may be served with notices, summonses, orders, and rules in causes depending in this Court; and every attorney hereafter to be admitted, and practising and residing as aforesaid, shall, upon his admission, make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book: And that all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served on such attorney, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summons, order, or rule for such attorney, in the said office of pleas, shall be deemed as effectual and sufficient, as if the same had been served at such place of residence as aforesaid.

Service of rules,
&c. not requiring personal service.

Service of notices, &c. after defendant has appeared, or plaintiff has entered an appearance, *sec. stat.*

That in all cases where a defendant shall have appeared in any action in the said office of pleas, and in cases where the plaintiff has entered appearance therein according to the statute, and the defendant shall by an attorney of this Court have given notice in writing to the attorney for the plaintiff or his agent, of his being authorized to act as attorney for such defendant, all proceedings, notices, and summonses, rules, and orders, which, according to the practice of this Court, were heretofore delivered by the sworn or side clerks of the other party, plaintiff or defendant, be delivered to, or served upon, the attorney or attorneys of the other party, plaintiff or defendant; and that

Time of service.

all notices, &c., shall be so served or delivered before nine o'clock in the evening.

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That one day's previous notice of the time of taxing costs, upon rules, orders, town *postees* and inquisitions, and a copy of the bill of costs and affidavit to increase, (if any), shall be given and delivered by the attorney or attornies of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of service of such notice; and that, in the cases of *postees* and inquisitions in country causes, the notice shall be given two days, and a copy and affidavit delivered two days before such taxation.

Proceedings before taxing costs.

That, upon process of *quo minus* and *venire facias* personally served on a defendant, and upon all writs of *distingas*, whereupon notice, pursuant to the statute 7 & 8 Geo. 4, c. 71, shall be given, returnable on any day of the Term, the plaintiff (a) shall be at liberty to declare *de bene esse* within eight days after the return thereof, or on appearance in chief; and if plaintiff declare, either conditionally or in chief, in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the defendant shall plead within four days after such declaration shall be filed or delivered, with notice to plead accordingly, without any imparlance; and in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, the defendant shall plead within eight days after such declaration shall be filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered on or before the last day of the Term in which such process shall be returnable, and a rule to plead be duly entered.

Declaring *de bene esse*.

Time of pleading.

That, on application by a defendant or his bail, or either of them, for an order of one of the Barons of this Court, to render a defendant to a county gaol, it shall be specified

Mode of proceeding to render, where defendant at large.

(a) See *ante*, p. 277.

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on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the Sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that on such lodgment and render, a notice thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any *exoneretur* (a).

Where defendant in custody.

And that if a defendant shall be in custody of the gaoler of the county gaol of any county in *England* or *Wales*, by virtue of any process issued out of any of his Majesty's superior Courts of record, he may be rendered in discharge of his bail in any action depending in this Court, in like manner as is hereinbefore provided for a render in

(a) By stat. 1 Wm. 4, c. 70, s. 21, it is enacted, "That a defendant, who shall have been held to bail upon any mesne process issued out of any of his Majesty's superior Courts of record, may be rendered in discharge of his bail, either to the prison of the Court out of which such process issued, according to the practice of such Court, or to the common gaol of the county in which he was so arrested, and the render to the county gaol shall be effected in the manner following: that is to say, the defendant, or his bail, or one of them, shall, for the purpose of such render, obtain an order of a Judge of one of his Majesty's superior Courts of *Westminster*, and

shall lodge such order with the gaoler of such county gaol, and a notice in writing of the lodgment of such order, and of the defendant's being actually in custody of such gaoler by virtue of such order, signed by the defendant, or the bail, or either of them, or by the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent; and the sheriff or other person responsible for the custody of debtors in such county gaol, shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such."

discharge of bail, and thereupon the bail shall be wholly exonerated from liability as such bail (a). 1830.

That, hereafter, there shall be two days appointed for the trials of causes at *Nisi Prius* in Term in *London*, and the like in *Middlesex*, to be named by the Lord Chief Baron of this Court, previous to the commencement of each Term; and that, on such nomination, the said Lord Chief Baron shall also appoint the hour at which the Court will sit on each of those days (b). Sittings.

That whenever a plaintiff shall rule the Sheriff on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and that a plaintiff, having so ruled the Sheriff, shall not proceed on any assignment of the bail bond, until the time has expired to bring in the body as aforesaid*. Justification of bail after body rule.

That hereafter all special bail shall be justified within Bail, when and where justified.

(a) By stat. 1 Wm. 4, c. 70, s. 22, it is enacted, "That a defendant, who shall hereafter be in custody of the gaoler of the county gaol of any county in *England* or in the principality of *Wales*, by virtue of any proceeding out of any of his Majesty's superior Courts of record, may be rendered in discharge of his bail in any other action depending in any of the said Courts, in the manner hereinbefore provided for a render in discharge of bail; and the keeper of such gaol, or such sheriff or other person

responsible for the custody of debtors as aforesaid, shall, on such render, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such."

(b) The days appointed for sittings are:—in *London*, the sixth day of the Term, the last day but two of the Term, and the day after the Term; in *Middlesex*, the seventh day of the Term, the last day but one of the Term, and the seventh day after the Term.

* LADD v. ARNABOLDI and Others.

CHILTON moved in this case to stay proceedings on the bail bond upon payment of costs. The Court granted the application.

VAUGHAN, B.—Upon the former discussion of this rule, I felt myself bound to decide, that the proceedings upon the bail bond were regular,

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four days after exception before a Baron at chambers, as well in Term as in Vacation (a).

REMOVAL OF CAUSES.

Removal of
causes from
Wales, &c.

WHEREAS, by an Act made and passed in the first year of the reign of his present Majesty, intituled "An Act for the more effectual administration of justice in *England* and *Wales* (b)"—it is amongst other things enacted, That all the power, authority, and jurisdiction of his Majesty's Court of Session of the said county palatine of *Chester*, and of the Judges thereof, and of his Court of *Exchequer* of the said county palatine, and of the Chamberlain and Vice-Chamberlain thereof, and also of his Judges and Courts of Great Sessions in the principality of *Wales*, shall cease and determine at the commencement of the said act; and that all suits at law (c) then depending in any of the said Courts, shall be transferred to the Court of *Exchequer*,

(a) This rule abrogates that part of the rule of *Trinity* Term, 26 & 27 Geo. 2, within brackets, *ante*, p. 276; and also the following rules: *Easter* Term, 56 Geo. 3, 2 Price, 327; *Trinity* Term, 56 Geo. 3, 3

Price, 35; *Hilary* Term, 1 & 2 Geo. 4, 9 Price, 57; and also the Memorandum, 4 Price, 155.

(b) 1 Will. 4, c. 70, s. 14.

(c) This act is amended by a subsequent statute, which trans-

according to the practice of the Court*. I then regretted that a difference should exist upon this subject in the practice of the respective Courts; and think, that, for the future, the practice should be assimilated.

BAYLEY, B.—For the future, the rule should in this respect be the same in all the Courts. When the plaintiff rules the Sheriff to bring in the body, he is to be considered as extending the period for the justification of the bail, until the expiration of the rule to bring in the body; because the bail to the Sheriff are identified with the Sheriff, and are securities to him. The plaintiff may have the bail bond assigned to him; but if, in the intermediate time, he rules the Sheriff to bring in the body, upon which the Sheriff would naturally give notice to the bail to perfect bail, it is not unreasonable that the bail should have the same time for perfecting bail that is allowed to the Sheriff to bring in the body.

* *Ante*, p. 97.

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there to be dealt with and decided according to the practice of the said Court of *Exchequer*, or of the Court from whence the same shall be transferred according to the discretion of the Court to which the same shall be transferred; which Court shall, for the purpose of such suits, only be deemed and taken to have all the power and jurisdiction to all intents and purposes possessed before the passing of this act by the Court from whence such suit shall be removed.

This Court doth therefore order, that, as to all suits at law depending in any of the said Courts on the 12th day of *October* last past, the same shall be dealt with and decided according to the practice of this Court, unless this Court, or a Baron thereof at chambers, shall, upon special application upon notice to an adverse party, otherwise direct.

Practice to be adopted.

And it is further ordered, that where process shall have been served, and the plaintiff shall not have declared, that the plaintiff shall be at liberty to declare on all process returnable before or in the present Term, or before or in next *Hilary* Term, or the vacation following the same, as if the same, as to all process returnable before the end of this present Term, had been made returnable in the present Term; and as to all process returnable between the end of the present Term and the vacation next following next *Hilary* Term, as if the same had been returnable of next *Hilary* Term; and the defendant shall appear to such process, or put in bail thereto within eight days after notice of this rule, as to writs, the return days whereof shall then be passed, and as to writs returnable after the end of the present Term, within six days after the same shall be returnable; and the defendant shall be at liberty to give a rule to declare, and, in default of declaration, to sign *non-pros* accordingly.

Mode of proceeding where writs returnable after the jurisdiction of Courts in Wales, &c., ceased.

fers all criminal proceedings and *King's Bench*, and writs of right to the Court of *Common Pleas*.
quo warrantos to the Court of

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Where declaration
filed.

And it is further ordered, that in all cases in which a declaration hath been delivered or filed in the Court of Sessions, a certificate thereof shall be obtained under the hand of the late Prothonotary or late Deputy Prothonotary of the Court in which the same shall be filed, and be verified by affidavit, to be intitled in this Court; and such certificate and affidavit shall be filed with the Deputy Clerk of the Pleas without fee or reward; and the plaintiff shall thereupon be at liberty to give a rule to plead, and, in default of plea, to sign judgment in like manner as if the declaration had been filed in this Court, an appearance having been first duly entered in this Court, if the same shall not have been entered in the said Court in which such suit was commenced; and each party shall be at liberty to plead, reply, or take any subsequent proceeding, and to rule an adverse party to proceed in such action as if the same action had been originally commenced in this Court; but that no judgment shall be signed for want of declaration, plea, replication, or other proceeding, until a rule to declare, plead, reply, rejoin, &c., shall have been first given in the office of pleas of this Court, and demand of declaration, plea, replication, or other proceeding, in writing, served on the adverse party or his attorney, according to the practice of this Court, so many days before such judgment shall be signed as the practice of this Court requires upon rules to declare, plead, reply, rejoin, &c.

Where interlocutory judgment
signed.

And it is further ordered, that, in case any interlocutory or final judgment shall have been signed in any of the said Courts abolished by the said act, the plaintiff, on filing a certificate thereof as aforesaid, shall be at liberty to proceed thereon in like manner as if such judgment had been signed in this Court; but, that in case process of execution shall issue on any final judgment signed in any Court abolished by the said act, it shall be stated in such process, in what Court final judgment was so signed as aforesaid.

Suggestion of
proceedings in

And it is further ordered, that any proceeding taken in any Court abolished by the said act, may be continued by

way of suggestion in this Court; such suggestion being subject to correction, upon a summons for the purpose by any of the Barons of this Court.

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Courts abolished.

That, in case any process shall have issued out of any of the Courts abolished by the said act, the Sheriff to whom the same may have been issued, may be ruled to return such process into this Court, in like manner as if the said process had been returnable in this Court; and if such Sheriff shall have made a return to the said Court so abolished as aforesaid, or shall make a return to this Court of *cepi corpus*, he may be ruled in like manner to bring in the body; and process so issued as last aforesaid may be returned to this Court by the Sheriffs of the county of *Chester*, county of the city of *Chester*, and principality of *Wales*, in like manner as if the same had been returnable in this Court.

Rules on Sheriff in respect of process issued out of Courts abolished.

MEMORANDA.

IN the early part of this Term, the Right Honourable *John Singleton*, Lord *Lyndhurst*, resigned the Great Seal, which his Majesty, on the 22nd November, 1830, was graciously pleased to deliver to *Henry Brougham*, of *Lincoln's Inn*, Esq., King's Counsel, who was raised to the Peerage by the title of Baron *Brougham* and *Vaux*, of *Brougham*, in the county of *Westmoreland*.

On the sixth day of this Term, the Honourable Sir *John Bayley*, Knt., was appointed one of the Barons of this Court, and took his seat as senior Puisne Baron.

On the same day *William Elias Taunton*, of *Lincoln's Inn*, Esq., King's counsel, *Edward Hall Alderson* of the *Inner Temple*, Esq., and *John Patteson* of the *Middle Temple*, Esq., were raised to the degree of the coif, and gave rings with the motto—*Nec temere nec timide*. They

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then took their seats: *William Elias Taunton*, Esq., and *John Patteson*, Esq., as Judges of the Court of *King's Bench*; and *Edward Hall Alderson*, Esq., as Judge of the Court of *Common Pleas*. The learned Judges were afterwards knighted.

During this Term, *Sir James Scarlett*, Knt., King's Counsel, resigned the office of his Majesty's Attorney-General, and was succeeded by *Thomas Denman*, of *Lincoln's Inn*, Esq., King's Counsel and Common Serjeant, who was knighted. *Sir Edward Burtenshaw Sugden*, Knt., King's Counsel, resigned the office of His Majesty's Solicitor-General, and was succeeded by *William Horne*, of *Lincoln's Inn*, Esq., King's Counsel, and Attorney-General to her Majesty, who was knighted.

John Williams, of *Lincoln's Inn*, Esq., King's Counsel, her Majesty's Solicitor-General, was appointed her Majesty's Attorney-General, upon the promotion of *Sir William Horne*, and *C. C. Popsy*, of *Lincoln's Inn*, Esq., King's Counsel, was appointed her Majesty's Solicitor-General, upon the promotion of *John Williams*, Esq.

In this Term, *George Heath*, of the *Inner Temple*, Esq., was called to the degree of Serjeant at Law, and gave rings with the motto—*Metuit qui sperat*.

In the vacation after this Term, *Robert Spankie*, Esq., Serjeant at Law, received a Patent of Precedence, to rank after *Frederick Pollock*, Esq., King's Counsel, and *D. F. Jones*, Esq., Serjeant at Law, also received a patent of Precedence, to rank after the Honourable *C. E. Law*, King's Counsel.

In the vacation after this Term, *Thomas Coltman*, Esq., was appointed one of his Majesty's Counsel learned in the law, and the Honourable *C. E. Law*, King's Counsel, was elected Common Serjeant of *London*, vacant by the appointment of *Sir Thomas Denman*.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

HILARY TERM, 1 WILL. IV.

BOWER v. KEMP.

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THE declaration in this case was delivered on the 22nd November, and, on the 25th, the defendant pleaded in abatement, that *the said promises in the said declaration* mentioned were entered into by him and others. The affidavit of verification was sworn at *Huddersfield*, on the 13th November, before the declaration was delivered. The plaintiff signed judgment on the 1st December, treating this plea as a nullity.

Alexander now moved to set aside this judgment for irregularity, and also, upon an affidavit of merits, to set aside the judgment upon payment of costs. He admitted that there was no case precisely in point; but contended, that the case of *Lang v. Comber (a)*, in which an affidavit of

An affidavit verifying a plea in abatement, which refers to the declaration, must be sworn after the declaration is delivered, and if it be sworn before the declaration is delivered, the plaintiff may treat the plea as a nullity, and sign judgment.

To set aside a judgment upon payment of costs, the affidavit must state that the defendant has a good defence upon the merits; that

he has a good and meritorious defence is not sufficient.

(a) 4 East, 348.

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v.
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verification, sworn at *Liverpool* on the same day on which the declaration was filed in *Middlesex*, was holden sufficient, established that the Courts would not look with great strictness to the period at which the affidavit was sworn, more particularly as, otherwise, it would in many cases be impossible for a defendant, living at a distance from *London*, to avail himself of a plea in abatement.

BAYLEY, B.—It is utterly impossible to say, that a plea in abatement, referring to the declaration, can be supported by an affidavit of verification, sworn before the declaration is delivered. The plea refers to the declaration, which, when the affidavit was sworn, was not in existence. The affidavit is a nullity, and therefore the judgment is regular. But, upon the ground of merits, you may take a rule *nisi* to set aside the judgment upon payment of costs.

Rule *nisi* accordingly (a).

ON a subsequent day, *Blackburn* shewed cause against this rule, and objected that the affidavit upon which the rule had been obtained was not in the usual form, that the defendant had a *good defence upon the merits*, but that, he had a good and meritorious defence to the action. He cited *Grottick v. Bailey* (b), and contended that it was dangerous to allow an innovation in the practice in this respect.

BAYLEY, B.—The party applying must lay a foundation for his application consistent with the practice of the Court, and for a very long period it has been the practice of all the Courts to require an affidavit that he has a good defence upon the merits. The utmost we can do is to en-

(a) See *Pearce v. Davy*, 1 Kenyon, 364; Sayer, 293, S. C.

(b) 5 B. & A. 703.

large this rule, upon payment of costs, to afford the defendant an opportunity of amending his affidavit.

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Rule accordingly.

The ATTORNEY-GENERAL v. CARPENTER.

Revenue.

THE defendant, having been served with a *subpœna*, at the suit of the *Attorney-General*, issuing out of this Court, and returnable on the first day of this Term, applied at the office to enter an appearance thereto in person, without paying the fees to the clerks in court. The clerks in court refused to enter the defendant's appearance, unless he would pay the sum of 14s. 4d., being 7s. 8d. for entering the appearance, and 6s. 8d. for a term fee. The defendant paid this sum under a protest, and now moved in person for a rule calling upon the clerk in court to refund the money, upon an affidavit stating these facts.

The appearance of a defendant in person in Court to a *subpœna* at the suit of the *Attorney-General*, may be recorded in Court, without the intervention of a clerk in court.

It was stated by the clerks in court, that, although they protested against the right of the defendant to call upon them to enter an appearance in the office without payment of their fees, the Court might order the appearance of the defendant to be recorded in Court, upon his application, without the intervention of a clerk in court.

BAYLEY, B.—It is impossible to say that a defendant is to be compelled to employ an attorney, which the payment of a term fee implies. It is the right of every one to appear in person, and the process requires the defendant to appear before the Barons at the return. Accordingly, I find, that, formerly, defendants frequently appeared in person, although, for the most part, appearances were made by attornies (a). Several instances of appearances in person are collected by Mr. Price, in his treatise upon

(a) Price, Ex. Pract. 611.

Revenue,
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ATT. GEN.
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CARPENTER.

the practice of the Lord Treasurer's Remembrancer's Office (a). I therefore think, that the appearance of the defendant in person should be recorded in Court; and the sum paid by the defendant under protest will, of course, be refunded by the clerks in court.

Lib. Reg.—"William Carpenter appears in Court, and prays that his appearance to a *subpoena*, at the suit of his Majesty's Attorney-General, returnable &c., may be recorded.

Ordered."

The appearance was entered in the Crown Process Book, thus:—

"14th January, 1831, William Carpenter appeared in person in Court, and prayed that his appearance might be recorded, which was ordered (b)."

(a) Page 618, 621, *et seq.*

(b) Where a defendant appears to an indictment or information in the Court of *King's Bench*, if he appear in Court in person, he pays no fees, and the same if he plead in person in Court. By the practice of this Court, the clerk in court who enters the defendant's plea to an information pays a fee to the King's Remembrancer, and it has been asked, who is to pay

the fee for entering the plea of a defendant who conducts his defence in person? In the *King's Bench* also, a fee is payable to the Master of the Crown Office by the clerk in court, upon entering the defendant's plea, when the defence is conducted by attorney; but where the defendant conducts his defence in person, and pleads in Court, no fee is paid to the Master of the Crown Office.

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1831.

LAMB v. BURNETT.

TRESPASS for assaulting and beating the plaintiff with fists, and with a rope, and imprisoning him and putting him in irons. Pleas—*first*, not guilty; and *secondly*, that the defendant, before and at the said time when &c., was master and captain of a certain ship trading to *China*, in the service of the *East India Company*, and that plaintiff then was a mariner in and belonging to, and on board of the said ship under the command of the defendant, to wit, &c., and the defendant, so being master and captain of the said ship, and in the actual exercise of his said office, and the plaintiff, so being a mariner in and on board of the said ship, and under the command of the defendant as aforesaid, a little before the said time when &c., conducted and behaved himself in and on board the said ship in a riotous, mutinous, and disorderly manner, and then and there refused to obey, and to permit to be obeyed by divers other sailors then on board the said ship under the command of the said defendant, the lawful and necessary commands of the said defendant, and then and there resisted the said defendant in the performance of his duty as such master and captain as aforesaid, to the evil and pernicious example of the said other sailors then on board the said ship, whereupon the said defendant, so being master and captain of the said ship as aforesaid, for the preservation of discipline and order in the said ship, and to punish the said plaintiff for his said riotous, mutinous, and disorderly conduct, and to enforce obedience to the lawful commands of him the said plaintiff, as such master and captain as aforesaid, beat, &c., the plaintiff with fists, and with a rope, &c.; and because it was then and there necessary and proper that the plaintiff should be further punished for his said riotous, mutinous, and disorderly conduct, and be kept separate and apart from the said other sailors

Where *C.*, a mariner on board an *East India* man, at anchor in the bay of *Canton*, within two miles of *Macao*, and within hail of several other vessels, having been guilty of disorderly conduct in the absence of the captain, was, upon the captain's return to the ship four days afterwards, ordered to be flogged, upon which *L.*, a mariner on board the same ship, resisted the execution of the captain's orders, and was guilty of riotous and mutinous conduct, for which by command of the captain he was flogged:—*Held*, that the captain was justified in flogging *L.*, and that the authority of the captain of a vessel to inflict moderate punishment is not confined to a case where the vessel is at sea beyond the reach of assistance; and that such punishment need not be inflicted immediately upon the act being done for which the punishment is inflicted.

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1831.

LAMB
v.
BURNETT.

then on board of the said ship, and be imprisoned, and because the said plaintiff could not be safely and securely kept separate and apart from the said other sailors, without being put and placed into irons, the defendant did the other acts complained of, so justifying the imprisonment of the plaintiff and putting him in irons. Replication, *de injuriá, &c.*

At the trial before *Bayley, B.*, at the *London* sittings after *Michaelmas* Term, the following appeared to be the facts of the case. The defendant was the captain of the *Scaleby Castle*, *East Indiaman*, trading from *London* to *China*, and the plaintiff was a mariner on board that ship. In the month of *December* the *Scaleby Castle*, with several other *East Indiamen*, was detained at anchor in the bay of *Canton*, within two miles of *Macao*, in consequence of disputes between the *East India* Company and the *Chinese* authorities. Whilst the *Scaleby Castle* was so at anchor, an inquiry was held by the officers, in the absence of the captain, who was at *Macao*, upon the conduct of a mariner of the name of *Cronan* for disobeying the orders of the gunner. The officers determined that *Cronan* had been guilty of the disobedience imputed to him, and sent to *Macao* for the captain, who, in three days afterwards, came to the ship. The captain then ordered *Cronan* to be flogged, upon which the plaintiff demanded by what authority the defendant ordered *Cronan* to be flogged, and the plaintiff, with many others of the crew, was guilty of riotous and mutinous conduct in resisting the execution of the captain's orders to flog *Cronan*. The other ships were within hail, and, on signals being made to them, sent boats with armed men, who came on board the *Scaleby Castle*, and quelled the disturbance. For this conduct the plaintiff was immediately flogged by the defendant's directions, and was afterwards imprisoned and kept in irons. The disobedience of *Cronan* was clearly proved. The learned Judge left it to the Jury to say, whether the plaintiff had conducted himself in the manner stated in the plea; and, if they should

be of opinion that the whole plea was not substantiated, whether the plaintiff had conducted himself in a mutinous manner, or had refused to obey the lawful commands of his captain. He also left it to the Jury to say, whether *Cronan* had been guilty of the disobedience imputed to him. The Jury found that the conduct of the plaintiff was disorderly and mutinous, and that *Cronan* had been guilty of the disobedience imputed to him, and they gave their verdict for the defendant.

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R. V. Richards now moved for a new trial. It cannot be denied, after the evidence which was given at the trial, that the conduct of the plaintiff was disorderly and mutinous. It may be admitted also, that, when a ship is on the high seas in a situation where it is impossible to procure assistance, a captain may inflict corporal chastisement. Such an authority is necessary to maintain a due subordination in the crew; but, as the necessity for such summary punishment ceases when a ship is at anchor and near assistance, the authority of the captain to inflict corporal punishment in this summary manner must also be held to cease. If, under circumstances like the present, corporal punishment may thus be inflicted, it might also be inflicted in the harbour of *Margate*, or even in the *East India Docks*.

[*Bayley, B.*—I doubt whether that question properly arises on this record, for it is alleged, that what was done was necessary; and there is no new assignment, the issue being, whether the plaintiff conducted himself in a mutinous and disorderly manner, and resisted the defendant in the performance of his duty.]

It was not necessary to reply the excess, because, if, under the circumstances, the defendant was not justified in flogging, the proceeding was void *in toto*. In *Phillips v. Howgate (a)*, the first count of the declaration stated,

(a) 5 B. & A. 220.

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that defendant assaulted and imprisoned the plaintiff, and, during such imprisonment, struck, pushed, and pulled him about: the defendant justified that he arrested the plaintiff under process, and that the plaintiff, whilst in custody, conducted himself in such a disorderly manner, that the defendant necessarily struck him: the latter part of this justification was not proved, and it was held that the plaintiff was entitled to judgment, on the general replication of *de injuriâ*, without having new assigned the excess.

[*Bayley, B.*—Because in that case the defendant did not prove all that was necessarily alleged in his plea. If a plea justify a battery as well as an assault, and the plaintiff prove a battery, the defendant must prove those circumstances stated in the plea which are alleged as a justification for the battery.]

It is the essence of this plea that the plaintiff disobeyed the lawful orders of the captain. Now, no lawful command was disobeyed. The question, whether the commands were or were not lawful, involves the authority to flog *Cronan*. The right to flog can exist only when a mutiny is prevailing at the time. A captain has no authority to keep a man in confinement and flog him at any subsequent period. The right is co-existent and co-extensive with the necessity; and, as it is not pretended that *Cronan* had committed any act of insubordination within three days previously to the arrival of the captain, the captain had *then* no right to flog him.

Lord LYNDHURST, L. C. B.—It does not appear to me that there is any ground whatever to object to the direction of the learned Judge. Upon the facts, the first question is, what was the conduct of *Cronan*. It is perfectly clear, upon the evidence, putting what passed before the Court of inquiry out of the question, that *Cronan* misconducted himself; that he had taken a part in the riotous proceedings in the absence of the captain; and that he had stated

to an officer that he would not obey any commands issued by him till the captain came on board. It appears that, in consequence of this conduct, the captain was sent for: he came on board three days afterwards; and immediately upon his arrival on board, that took place which has given rise to this action; he directed *Cronan* to be flogged; and, I apprehend, for the purpose of enforcing obedience in the ship's crew, the captain has authority to order any of the crew who misconduct themselves to be moderately and properly corrected. It also appears to me, that, in this case, no objection can be made as to the interval which elapsed between the time when the offence was committed by *Cronan*, and the period when the punishment was inflicted by order of the captain. The moment the captain arrived on board he directed the punishment to be inflicted.

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The next question is, what was the conduct of *Lamb*. *Lamb* appears to have been at the head of those persons who opposed the infliction of punishment upon *Cronan*; and every person hearing the evidence must be satisfied that the conduct of the parties, upon the occasion in question, was extremely objectionable and mutinous. Under such circumstances, it appears to me that the captain was justified in authorizing and directing punishment to be inflicted upon *Lamb*. There is no question raised upon this record, as to the extent of such punishment. Under such circumstances, it appears to me that the Jury were perfectly right in the verdict they pronounced.

It does not appear to me that there is any objection upon this record. The language of the plea is, that the plaintiff behaved in a riotous, and mutinous, and disorderly manner, and then and there refused to obey and permit to be obeyed, by the other sailors on board this ship, the lawful and necessary commands of the defendant, and resisted the defendant in the performance of his duty. There can be no objection upon that statement upon the

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record; and if one of the crew does refuse to obey the lawful commands of the master of a vessel, the master is justified in inflicting such punishment upon him as may be necessary to restrain such conduct.

I think, therefore, with reference to the record, as well as to what took place upon the trial, that there is no ground to object to any part of the proceedings.

GARROW, B.—I entirely concur in the opinion that has been expressed; and I think that the persons most interested in this decision, and in the decision being made promptly without any delay which might suggest the idea that there was some doubt upon the subject, are the sailors navigating the commercial vessels of this country. Nothing can be more dangerous than that they should leave this country upon a foreign voyage, under the impression that it is for them, and not for responsible officers; to decide how the discipline of the ship is to be carried on; and that, where a certain portion have engaged in mutinous conduct, which renders it impossible that the duty of the ship can be carried on, the remainder may erect themselves into a court of appeal, and determine against their officers, who are acting under the highest responsibility. The law is open to the meanest man on board, if the captain or any officer conduct himself with cruelty in administering the discipline of the ship; but the lives of many valuable men would be at stake and sacrificed, if any Court or Judge could entertain a doubt upon the point stated.

I am most clearly of opinion, without the least doubt or hesitation, that the verdict is right, and that we should do incalculable mischief if we were to disturb it.

VAUGHAN, B.—I am of the same opinion. If any reasonable doubt could have been entertained on the subject, I should be the first to put the case in a train for further

inquiry. In a case like the present, it is most important that the public should be in no doubt as to the rights of the parties.

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This is an application to the sound discretion of the Court, and the ground upon which the application for a new trial is founded is, that the verdict is against evidence. When that point shall be disposed of, it has been intimated by the counsel for the plaintiff, that another question arises, whether, in point of law, admitting the facts to be true, they would amount to a justification: That part of the application appears to me to be novel, and in the nature of an experiment, because these pleas have been put upon the record so long as I have been acquainted with the profession; and it never occurred to any body, by way of demurrer, to raise the question whether the facts here stated amounted to a justification; and therefore, it comes merely to the question, whether, under the circumstances proved, this verdict ought to be disturbed.

It appears to me, that the case was left with every possible advantage to the plaintiff; and there is no ground of complaint that full justice has not been done him; in the mode in which the question was shaped and presented to the Jury.

It is stated to have been left by the Judge who tried the cause, that there were two questions for the consideration of the Jury—*first*, whether *Cronan* was guilty of the offence imputed to him; and *secondly*, whether the plaintiff was or was not guilty of riotous and disorderly conduct. It is admitted by the learned counsel for the plaintiff, that the evidence was too strong for him to contend that there was not enough to satisfy the minds of the Jury that the crew was in a mutinous state; but he endeavours to raise the question, whether, under the circumstances in which the captain was placed, he could justify this assault.

It was suggested, that this differed very much from the ordinary case; that this ship was within two miles

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of the shore; that the captain had the assistance of other vessels near him; and that there was no necessity for the exercise of this power. It is new to me to hear, that the authority of the captain is to expand and to contract, according to the distance of his vessel from the shore. If he is on board his ship, exercising the authority of captain, and the crew is mutinous, it is of the most vital importance that this power should be exercised, so far as moderate correction extends; and if there were any excess upon this occasion, that is not put in issue upon this record. We are bound to assume that the defendant stands in the relation of captain, and that the plaintiff stands in the relation of mariner; that, as a mariner, he conducted himself in a riotous manner, and that, under those circumstances, a moderate castigation was inflicted. I should be sorry it should go forth for a moment, upon these facts being ascertained, that any doubt could be entertained as to the propriety of the conduct of the captain in this respect.

BAYLEY, B.—If I thought any doubt could be entertained as to the propriety of the verdict, I should be the last person to wish that further inquiry should not be made; but having considered the case a great deal since the trial, I have a perfect conviction in my own mind, that the verdict was right; and I think we might be creating great prejudice to the service in general, if we granted this rule. Generally speaking, if there were any ground of doubt, I should be particularly anxious, in the case of men standing in the situation of ordinary seamen, that their rights should not be hastily decided; and if there were any reasonable doubts, that they should be carefully discussed and investigated: but, in this case, it appears to me there is no reasonable degree of doubt.

It is suggested, that this transaction did not take place at sea, but in a foreign port, more properly perhaps in a fo-

reign river; but it seems to me that such fact makes no difference. You may have a mutiny as well in a foreign port, or in a foreign river, as at sea; and your ship may be entirely sacrificed, or you may be deprived of the capability of navigating your ship back again, unless you have the means of promptly adopting that course which the law has cautiously put into your power.

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What does the law authorize you to do in the case of misconduct? To inflict moderate punishment. The punishment must be moderate and proportioned to the offence; and, though the party guilty of misconduct may bring his action if he can shew that the punishment was disproportionate, yet he must adopt the course the law points out for that purpose. Here, he does not adopt that course, but he says, there was no cause for punishment at all. What is the cause charged upon the present occasion? The cause charged is, that the plaintiff behaved in a riotous and mutinous manner, and refused to obey, and permit to be obeyed by the other sailors on board the ship, the defendant's lawful commands, and resisted the defendant in the performance of his duty, and set a pernicious example to the other sailors. Now, if the defendant had only made out that the ship was in a state of mutiny, and that the plaintiff was concerned in that mutiny, I should have thought that sufficient to justify the captain in punishing the party; but, as it seems to me, upon the evidence, the whole charge was made out so as to establish the whole of the cause which is contained in this plea. That the ship was in a state of mutiny on the 24th of *January*; there can be no doubt at all; that *Cronan* was called forward for the purpose of receiving punishment for some offence which was supposed to have been committed, is also a question with reference to which there is no degree of doubt. He is told by the captain, before there is an attempt to punish him, what the charge against him is, and he says he may have been

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guilty of the offence imputed to him, namely, of using an expression which amounts to disorderly conduct from a common sailor on board to one of the officers. But the question as to his improper and disorderly conduct in that respect does not rest there, because there is positive testimony from the different witnesses, that the conduct charged upon him on the 19th really and actually took place. Why then, if *Cronan* was guilty of that offence, was not the captain justified, for the sake of preserving discipline, in directing that he should be punished? Is a sailor to be at liberty to interfere, and say that the punishment shall not take place? There can be no doubt that the conduct of *Lamb*, at the period in question, connected with the conduct of other persons on board, shewed that he meant to prevent the punishment of *Cronan*. It was not to remind the captain that *Cronan's* case had not been properly heard, that *Cronan* was innocent of the offences imputed to him, or that there had not been a fair and legal trial; but the objection was, that there should be no flogging: and whether *Cronan* had or had not been guilty of this offence was not the question upon which the crew were acting; they were acting upon the question, whether or no there should be any flogging on board that ship.

It was suggested by Mr. *Richards*, while he was making the motion, that *Cronan's* conduct had occurred four days before there was an order to punish him; but, in my opinion, the master had a right to insist upon punishing him, notwithstanding that interval of time. It is quite right that there should be moderate punishment: it is quite right that you should forbear to put the punishment in force until the period of time at which he who ought to have the best discretion upon the subject is present; and, if the captain happen to be absent, it is most desirable that the officers should not take upon themselves, in the absence of the captain, to inflict the

punishment that ought to be inflicted: it is reasonable that they should wait: they do wait, and they send for the captain, and it is in pursuance of the representation to the captain that the party is punished.

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Under these circumstances, it seems to me that the captain was fully justified with reference to the punishment of *Cronan*, and that the crew, and *Lamb*, among the others, had no right to insist that there should be no flogging.

I am therefore of opinion, in this case, that the verdict which the Jury have given is right, and that there is no ground for disturbing that verdict.

Rule refused.

LUMBY v. ALLDAY.

ACTION for words. The first count of the declaration, after the usual inducement of the plaintiff's good conduct, stated, that, before the time of the speaking and publishing the several false, scandalous, malicious, and defamatory words by the defendant, the plaintiff was, and from thence hitherto had been and still was, clerk to a certain incorporated company, to wit, the *Birmingham and Staffordshire Gas Light Company*, and as such clerk had always behaved and conducted himself with great diligence, industry, and propriety, by means whereof he was acquiring gain and profits, &c.: yet, defendant intending, &c., and to cause it to be believed by the neighbours and subjects, and the persons composing the said company, that the said plaintiff was of a bad character, and unfit for his situation of clerk to the said *Birmingham and Staffordshire Gas Light Company*, and an improper per-

Words to be actionable as spoken of a man in his office must be spoken of him in reference to his character or conduct in such office, and must impute to him the want of some qualification for, or misconduct in, his office.

Where, therefore, a declaration stated that the plaintiff was clerk of a gas company, and that the defendant spoke of him these words:

"You are a fellow, a disgrace to the town, unfit to hold your situation, for

your conduct with whores," &c.:—*Held*, that the words were not actionable.

Where that which is laid as the cause of action in the declaration is proved at the trial, the plaintiff cannot be nonsuited, upon the ground that the facts charged do not disclose a cause of action.

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son to be employed by the said company, and to cause him to be deprived of and lose his situation, &c. &c., to wit, on &c., at &c., in a certain discourse which the said defendant then and there had with the said plaintiff, of and concerning the said plaintiff, and of and concerning the premises, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published to, and of and concerning the said plaintiff, and of and concerning the premises, these false, scandalous, malicious, and defamatory words following (that is to say): "You (meaning the said plaintiff) are a fellow, a disgrace to the town, unfit to hold your (then and there meaning the said plaintiff's) situation (then and there meaning the said situation of clerk to the *Birmingham and Staffordshire Gas Light Company*), for your conduct with whores. I will have you in the *Argus*. You (then and there meaning the said plaintiff) have bought up all the copies of the *Argus*, knowing you (then and there meaning the said plaintiff) have been exposed. You may drown yourself, for you (then and there meaning the said plaintiff) are not fit to live, and are a disgrace to the situation you (then and there meaning the said plaintiff) hold (then and there meaning the said situation of clerk to the *Birmingham and Staffordshire Gas Light Company*)." Plea—Not guilty.

At the trial, before *Alexander*, L. C. B., at the last Assizes for the county of *Warwick*, the plaintiff proved the material part of the words charged in the first count. The counsel for the plaintiff submitted, that the words were not actionable, and that the plaintiff ought to be nonsuited. The learned Judge refused to nonsuit the plaintiff, and told the Jury, that if they thought the words might *probably* have occasioned the loss of the plaintiff's situation, to find a verdict for the plaintiff; and the Jury having found a verdict for the plaintiff, he gave the defendant leave to move to enter a nonsuit.

Adams, Serjt., in *Michaelmas* Term last, obtained a rule to set aside the verdict, and to enter a nonsuit; against which—

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Goulburn, Serjt., shewed cause.—The rule is, that words, which may probably occasion the loss of the plaintiff's situation, are actionable, where the situation is one of profit. This was laid down by *De Grey*, C. J., in *Onslow v. Horne* (a), and is in accordance with the direction of the Lord Chief Baron at the trial. Mr. *Starkie*, adopting this rule, observes, that "words are actionable which directly tend to the prejudice of any one in his office, profession, trade, or business (b)." And in another passage he adds, "When his office is lucrative, words which reflect upon the integrity or capacity of the plaintiff render his tenure precarious, and are, therefore, *pro tanto*, a detriment in a pecuniary point of view (c)." Now, the plaintiff was proved to hold a lucrative office, and imputations, which would put that office in jeopardy, come within the rule upon this subject; at all events, the objection, if good, is upon the record; and as all the material words were proved, there was no ground for entering a nonsuit at the trial; and therefore this rule must be discharged.

Adams, Serjt., *contra*.—In an action for words, the plaintiff must be nonsuited, if the words are not actionable, for the Jury cannot assess the damages when there is no cause of action.

[*Bayley*, B.—The rule is, that if the facts alleged in the declaration be proved, it is the duty of the Jury to find for the plaintiff; and if those facts do not disclose a sufficient cause of action, the defendant must move in ar-

(a) 3 Wilson, 186; 2 Sir W. Bl. 754.

(b) 1 Starkie Sl. 117.

(c) 1 Starkie Sl. 118.

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rest of judgment. Where a defendant is satisfied that the allegations if proved do not establish a cause of action, he ought to demur. The Judge is not at liberty to nonsuit on the ground that the facts alleged in the declaration, do not amount to a cause of action.]

It cannot be contended that the words are actionable, *per se*; and they are clearly not actionable as spoken with reference to the plaintiff's situation. The imputation does not affect him in his situation of clerk, and are equally actionable whether they were spoken of the plaintiff in his situation, or in his private capacity. Words, to be actionable by reason of an imputation upon the plaintiff's trade, must be spoken of him in his trade, and with reference to his trade. They must either impute some misconduct in his trade, which renders him unfit for his situation, or be calculated to injure him in his trade. It is consistent with this imputation, that the plaintiff might have conducted himself honestly to the company, and have faithfully and efficiently performed his duty; and therefore the words cannot be actionable as spoken of the plaintiff in his trade.

Cur. adv. vult.

The judgment of the Court was now delivered by—

BAYLEY, B.—This case came before the Court upon a rule *nisi* to enter a nonsuit. The ground of motion was, that the words (in slander) proved upon the trial were not actionable.

Two points were discussed upon the motion: one, whether the words were actionable or not—and the other, whether this was properly a ground of nonsuit.

The declaration stated that the plaintiff was clerk to an incorporated company, called the *Birmingham and Staffordshire Gas Light Company*, and had behaved himself as such with great propriety, and thereby acquired and was daily acquiring great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situa-

tion, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words complained of in the declaration.

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The objection to maintaining an action upon these words is, that it is only on the ground of the plaintiff being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not, from their tenor, import that they were spoken with any such reference; that they do not impute to him the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by *De Grey*, C. J., in *Onslow v. Horne* (a), "that words are actionable when spoken of one in an office of profit, which may *probably* occasion the loss of his office; or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage." The same case occurs in Sir *Wm. Bla.* Rep. 753, and there the rule is expressed to be, "if the words be of probable ill consequence to a person in a trade or profession, or an office."

The objection to the rule, as expressed in both reports, appears to me to be, that the words "probably" and "probable" are too indefinite and loose, and unless they are considered as equivalent to "*having a natural tendency to,*" and are confined within the limits, I have expressed in stating the defendant's objections, of shewing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant.

Every authority which I have been able to find, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the

(a) 3 Wils. 186.

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plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion, that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk. I say as at present advised, for the reason which I am about to state.

The next question is, whether this is properly a ground of *nonsuit*; and I am of opinion that, under the circumstances of this case, it is not. The words proved are nearly all the words which the first count contains; and if the words proved are not actionable, none of the other words contained in that count are. When the general issue is pleaded to a count, it puts in issue to be tried by the Jury the question, whether the facts stated in that count exist? The legal effect of those facts, whether they constitute a cause of action or not, is not properly in question. The proper mode to bring that legal effect into consideration, is, before trial, to demur; after trial, to move in arrest of judgment. The duty of the Judge, under whose direction the Jury try questions of fact, is not to consider whether the facts charged give a ground of action, but to assist the Jury in matters of law, which may arise upon the trial of those facts.

As the defendant, therefore, in this case put in issue the allegations in the declaration, and those allegations were proved upon the trial, we are of opinion that the rule for a nonsuit ought to be discharged; and, notwithstanding the lapse of time, that there ought to be a rule *nisi* to arrest the judgment, if the defendant be advised to take such rule.

Rule discharged (a).

(a) The parties acquiesced in the judgment of the Court, and the matter ended.

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EDWARDS v. BROWN, HARRIES, AND STEPHENS.

DEBT upon a bond dated 12th October, 1826. The defendant, *Brown*, suffered judgment by default. The bond, as set out on *oyer*, appeared to be a bond given upon a mortgage for 1800*l.* to the plaintiff. It recited that *Brown* was seised in tail of the mortgaged premises; that, by lease and release, of even date, the premises had been conveyed to make a tenant to the *præcipe*, that a recovery might be suffered; and the condition was, that if the recovery should be suffered in manner and form mentioned in the release, and so and in such manner as that under and by virtue of the recovery and of the release, the premises should be vested in the plaintiff in fee, according to the true intent and meaning of the release, the bond should be void. The defendant, *Harries*, then pleaded, *first, non est factum*; *secondly*, that the recovery was suffered *modo et formâ*, &c.; and that, under and by virtue of the recovery, and of the lease and release, the premises became vested in the plaintiff in fee, according to the true intent and meaning of the release; *thirdly*, that a recovery was suffered, and that *if Brown* had been seised in tail, the premises would have vested in the plaintiff in fee(a); and *fourthly*, that the recovery mentioned in the release was suffered. *Stephens* also pleaded *non est factum*, and a plea similar to the second plea of *Harries*. The plaintiff replied to the second pleas of *Harries* and *Stephens*, that the recovery was not suffered so and in such manner as that, under and by virtue thereof, and of the lease and release, the premises became vested in the plaintiff in fee, according to the true intent and meaning of the release; and to the fourth plea, pleaded by *Harries*, that the recovery was not suffered so and in such

Where a party who executes a bond is at the time competent to execute it, he cannot, under the plea of *non est factum*, shew that he was misled as to the legal effect of the bond.

A., and *B.* and *C.*, his sureties, executed a mortgage bond, which recited that *A.* was seised in tail of certain premises, and was conditioned, that a recovery should be suffered, so as and in such manner as that under and by virtue thereof, and of a release to make a tenant to the *præcipe*, (also recited), a fee should be vested in *D.*—*Held*, that the legal effect of the bond was, that *D.* should have a fee, and that *A.*, being seised for life only, the bond was forfeited.

(a) See this plea, 3 Y. & J. 424.

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manner as that, under and by virtue thereof, and of the lease and release, the premises became vested in the plaintiff in fee according to the true intent and meaning of the release. Issues were joined on the pleas of *non est factum*; on the replications to the second and fourth pleas of *Harries*, on the replication to the second plea of *Stephens*, and on the replication to the third plea of *Harries*, upon which no question arose (a).

At the trial, before *Park, J.*, at the last summer assizes for the county of *Hereford*, it appeared, that *Brown* was seised of the premises in question for life only (b), and not in tail: so that, although the recovery was duly suffered, it could not vest in the plaintiff a fee. *Russell, Serjt.*, tendered evidence to prove that *Stephens* had been induced by fraud to execute the bond, but the learned Judge was of opinion, that such evidence was not admissible under the plea of *non est factum*. The Jury found a verdict for the plaintiff.

In *Michaelmas* Term last, *Russell, Serjt.*, for *Stephens*, obtained a rule to shew cause why a new trial should not be had, upon the ground of the rejection of the evidence of fraud; and *E. V. Williams* obtained a rule *nisi* to enter a verdict for the defendant *Harries*, upon the second and fourth pleas, upon the ground that the recovery was suffered according to the true intent and meaning of the condition and release.

John Evans and *Godson* shewed cause.—Fraud is not admissible under the general issue. It is laid down in

(a) The validity of the third plea was before discussed and determined. See 3 Y. & J. 424.

(b) *Williams* obtained a rule *nisi* for a new trial, upon the ground that the evidence did not shew that

Brown was only seised for life of the premises; but as this question turned upon the effect of the evidence merely, the arguments and the judgment upon this point are omitted.

Chitty on *Pleading* (a), and in *Tidd's Practice* (b), that fraud is admissible under the plea of *non est factum*, upon the authority of the case of *Lambert v. Atkins* (c); but that, which was a case of coverture, does not bear out that position. It may be admitted that fraud avoids all contracts; but it does not, therefore, follow, that fraud may be given in evidence under this plea. In *Harmer v. Wright* (d), it was decided, that the defendant could not, on the plea of *non est factum*, prove that the bond was void at common law, as being an illegal contract to forego prosecutions for felonies. The correct rule appears to be, that nothing that affects the consideration or inducement to execute the bond can be given in evidence under the plea of *non est factum* (e). *Whelpdale's* case (f) is no authority for the defendant; and the second and third resolutions shew that where a deed is voidable, as by duress, or is void by reason of an act of Parliament, the matter must be pleaded specially. In the note to this case by *Fraser*, the rule is stated to be, that whatever tends to shew an invalid or defective execution of a deed at the time of plea pleaded, may be given in evidence under the plea of *non est factum*; but whatever impeaches the deed by reason of the matter or consideration thereof, whether such matter or consideration renders the deed void by the policy of the common law, or by the express provisions of the statute law, must be specially pleaded, and such plea ought to conclude with "and so the said deed is void," and not with "*et sic non est factum*." Here the evidence was not tendered to affect the execution of the bond, but to impeach the consideration or inducement to execute it; and therefore this defence should have been pleaded specially, and could not be admitted under the plea of *non est factum*.

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(a) Vol. 1, p. 424, 425.

(b) Vol. 1, p. 650.

(c) 2 Camp. 272.

(d) 2 Stark. 35.

(e) See the cases collected by Roscoe, on Evidence, 244.

(f) 5 Rep. 119 a.

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The point, as to the effect of the recovery, was decided by the Court upon the former argument, and the authorities are collected in the report of that argument (a).

Russell, Serjt., for the defendant *Stephens*.—This defence of *Stephens* was receivable under the plea of *non est factum*. He was induced to execute by the misrepresentation of the plaintiff. The contract was concocted in fraud, and, being fraudulent, it never could have been his deed. The rule is, that where originally, or at the time of plea pleaded, it is not the deed of the party, it may be given in evidence under *non est factum*; and in no case, except in that of forgery, can it be less the deed of the party than when it is obtained by fraud, for fraud vitiates all transactions. *Fermer's case* (b). In the modern publications on pleading, though a form is given of a plea of fraud, concluding "and therefore the bond is void," yet it is said, that fraud may be given in evidence under the general issue.

[*Bayley*, B.—Can you distinguish this from a case of duress?]

In the second resolution in *Whelpdale's case*, duress is classed amongst those cases in which the deed is voidable merely. The note by Mr. *Fraser* to that case is in favour of the defendant; he states, that what tends to shew an invalid or defective execution, may be given in evidence under *non est factum*. The present case falls within that rule. He then adds, that what impeaches the deed by the matter or consideration thereof, must be specially pleaded. Here it is not attempted to impeach the matter or consideration of the bond, but the evidence was offered to shew that the party was induced to execute by fraud. If unlettered and mis-read is evidence under *non est factum*, as to which there can be no doubt (c), misrepresentation of the

(a) 3 Y. & J. 423.

(b) 3 Rep. 77 a. ⚡

(c) See Com. Dig. *Fait*, (B. 2), Reading.

effect of the instrument must likewise be admissible under that plea. In *Thompson v. Rock* (a), it was held, that, upon a plea of *non est factum* to a sheriff's bond, the defendant might shew, at the trial, that the bond was dated and executed on a day subsequent to the return of the writ (b).

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E. V. Williams, for Harries.—Looking at the bond and the release, the intention of the parties was merely that a recovery should be suffered. The bond was executed upon an assumption that the circumstances recited were true; and if the recitals had been true, the recovery would have vested a fee in the plaintiff. The object of the recitals is to prevent a discussion as to the existing state of things, and to shew upon what terms the obligation was entered into. In the argument upon the former occasion, an authority was cited, to shew that recitals cannot operate as an estoppel (c), and so it is laid down in *Co. Litt.* 352; but all the subsequent authorities are clearly the other way. The cases upon this subject were brought under consideration in *Kelly v. Wright* (d), and there the older authorities were overruled. The doctrine now is, that the intention of the parties is to be collected from the recitals as well as from the other parts of the deed. This was established in *Lord Arlington v. Merricke* (e), and has been uniformly acted upon in a long series of decisions (f).

Cur. adv. vult.

BAYLEY, B., now delivered the judgment of the Court, and, after stating the pleadings as above, proceeded thus:—

(a) 4 M. & S. 338.

(b) The authority of this case is questioned by Mr. *Fraser* in his learned note to *Whelpdale's* case, 5 Rep. 244.

(c) Br. *Faits*, p. 4; 18 Ves. 181.

(d) Willes, 12.

(e) 2 Saund. 414.

(f) See the cases collected 2 Saund. last ed. 414, n. (5), n. b, c; and see *Parker v. Wise*, 6 M. & S. 239.

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At the time of the trial, the defendant, *Stephens*, offered to prove that he was drawn in by fraud to execute the bond; but the learned Judge being of opinion that fraud could not be given in evidence upon *non est factum*; that evidence was rejected; and it is upon the ground that such rejection was improper that my brother *Russell* obtained his rule *nisi* for a new trial.

I agree with my brother *Russell*, that, whatever shews that the bond *never was the deed of the defendant* may be given in evidence upon *non est factum*. But if the party actually executes it, and was competent at the time to execute it, and was not deceived as to the *actual contents* of the bond, though he might be misled as to the *legal effect*, and though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became, by the execution, *the deed of the defendant*, and he is not at liberty, upon the plea of *non est factum*, to say it was not.

The rule, as laid down in *Gilbert's Evidence*, 162, is this—"The only point in issue, and the controversy, on *non est factum*, is, whether the deed declared on be the act of the party, so that when the act is proved to be done, the whole matter denied by the defendant is proved to the Jury; but if there be any other circumstances to destroy that act, and avoid its binding force, that must be shewn to the Court, that the Court may judge, and not the Jury, whether they are sufficient to avoid that deed." And we accordingly meet with many instances in which what would avoid the deed and destroy its binding force, both at common law and by statute, has been held inadmissible in evidence upon *non est factum*, and other instances in which it has been specially pleaded.

In *Whelpdale's case* (a), the third resolution is—"Where a bond or other writing is by act of Parliament enacted to

be void, the party who is bound cannot plead *non est factum*; but, in construction of law, the deed is to be avoided by the party who is bound by it, by pleading the special matter, taking advantage of the special matter; for although the act makes the bond or other writing void, yet thereto the law doth tacitly require order and manner, which the obligor ought to follow."

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In *Colton v. Goodridge* (a), the defendant was not allowed, upon *non est factum*, to refer to the condition of the bond, to shew that it was in restraint of marriage, and therefore void at common law.

So, in *Harmer v. Rowse* (b), the defendant was not allowed to prove, on *non est factum* to a bond, that it was given to stifle a prosecution for felony, and therefore void at common law.

In *Thompson v. Harvey* (c), where the objection to a bond was, that it was in restraint of trade, which is a common law objection, it was pleaded specially; and in *Collins v. Blantern* (d), where the defence to an action on a bond was, that it was given to suppress a prosecution for perjury, it was pleaded specially; and in this, and the case of *Thompson v. Harvey*, the conclusion of the plea was not *et sic non est factum*, but, and so the bond was void in law.

But the authorities which come closest to this case, and press most strongly on my mind, are the cases of duress and threats. Every argument which can apply to a case where fraud is the defence, apply equally where threats or duress are the defence. The party is equally deprived of his free agency and uncontrolled judgment in either case. And yet, where duress or threats are the defence, there is authority upon authority that they cannot be given in evidence upon *non est factum*, but must be pleaded specially. The rule I have mentioned. from

(a) Bl. 1108. (b) 6 M. & S. 146. (c) 1 Show. 2. (d) 2 Wils. 341.

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Gilbert's Evidence, 162, is given as the reason why a man cannot give duress in evidence under *non est factum*.

In 1 *Hen.* 7, 15 *b*, *Keble* lays it down, if a man confess an obligation to be his deed, he shall not conclude *non est factum*, as if he pleaded infancy; the same law is where he pleads that he made the obligation of duress by imprisonment.

So, 14 *Hen.* 8, 28 *a*, if a deed be made by duress of imprisonment, the defendant ought to conclude to the action, for it would be a false conclusion to say, *et sic non est factum*, for it was his deed.

Again (*a*), if an infant or a man by duress make an obligation, they shall demand judgment *si actio*, because the delivery of the deed was not void.

So, *Doctrina Placitandi*, 259, if a feme covert make an obligation, she may plead *non est factum*; but otherwise it is in case of an infant or of duress, for then it is only voidable; and, therefore, the parties cannot plead *non est factum*, but they shall say judgment *si actio*.

The second resolution in *Whelpdale's* case is to the same effect; and upon these authorities our opinion is, that the plea of *non est factum* in this case did not entitle the defendant to give the evidence he offered; and, consequently, that such evidence was rightly rejected.

This brings us to Mr. *Williams's* objection, which is, that, by the recovery which was suffered, the fee did vest in the plaintiff according to the true intent and meaning of the release. This objection rests wholly upon the expression, according to the true intent and meaning of the release; and it is founded upon this, that, according to the true intent and meaning of the release, and the right construction to be put upon it, it was sufficient if a recovery was suffered; but that it was not essential it should give the plaintiff a fee.

The first answer to this objection is, that it makes the construction of the release parcel of the issue to be tried by the Jury, putting to them to decide, not a question of fact, but a matter of law; and the next, that it gives these words in the issue a meaning they could not have been intended to bear. If, according to the true construction of the issue, they are inserted to qualify the issue, and to make it mean not that the recovery vested a fee in the plaintiff *simpliciter*, but that it vested a fee in him as far as a recovery by *Brown* could vest one, Mr. *Williams's* objection would be valid; but if these words meant no more than to signify that it was the intention of the release that the plaintiff should have a perfect and effectual fee, the objection fails, and the plaintiff is entitled to have this rule discharged. And I have no doubt but that the latter is the meaning.

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The defendants all represent, by the recital in the condition of the bond, that *Brown* is seised in tail. The plaintiff takes the estate, not for enjoyment, but as a security for money, and not for money of his own, but for trust money. When, therefore, he takes a covenant for a recovery, (which, if the recital were true, would give him a fee), he does wisely to take a covenant, not merely that a recovery shall be suffered, but that it shall be suffered so as to have the effect of giving him the fee, it being clearly and unequivocally the intention of that security that he should have the fee. What is the species of contract for title that a mortgagee is naturally to be expected to take? Not one that is qualified according to the title of the mortgagor, but one that is absolute; and, as the condition of this bond shews that the money which the bond secures was lent to *Brown* by way of mortgage, this was the species of contract the defendants were naturally to expect.

We are therefore of opinion, that both the rules in this case ought to be discharged.

Rules discharged.

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WINTLE and Others v. CROWTHER and COMBES.

Where a partnership firm is pledged by the acceptance of a bill of exchange by one partner in the name of the firm, the partnership, of whomsoever it may consist, whether they are named or not, and whether the partners are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached.

Where a bill, accepted in a partnership firm, is applied, with the knowledge of the party who takes the bill, in part only to the separate use of the partner who actually accepts it, a secret partner, not known to the party who takes the bill, is liable in respect of so much of the amount as is not to the knowledge of the taker applied to the separate use of the partner who accepts the bill.

ASSUMPSIT by the plaintiffs as indorsees, against the defendants as acceptors of two bills of exchange, the one dated 18th August, 1828, for 130*l.* 10*s.* 6*d.*, and the other dated 5th September, 1828, for 45*l.* 10*s.* The defendant, *Crowther* suffered judgment by default, and the defendant *Combes* pleaded *non assumpsit*.

The cause was twice tried. Upon the first trial the Jury found a verdict for the defendants, which verdict was set aside as being contrary to the evidence, and a new trial was granted. Upon the second trial, it appeared that *Crowther* and *Combes* carried on the business of coal merchants at *Bristol*, *Combes* being a secret partner residing at *Newport*; and that *Crowther* also carried on the business of a slop-seller at *Bristol*, on his own separate account. In the latter business *Crowther* contracted a separate debt with the plaintiffs for 80*l.*, for which the plaintiffs drew on him two bills of exchange for 40*l.*, and 38*l.* 8*s.* 6*d.*, the first of which became due on the 13th July, 1828, and was dishonoured. The second bill for 38*l.* 8*s.* 6*d.*, became due on the 18th August, 1828, on which day *Crowther* took the bill for 130*l.* 10*s.* 6*d.* to the plaintiff's house, and told *Gilbert*, the plaintiff's shopman, that he had a bill for which he wanted cash. *Gilbert* shewed *Crowther* in to one of the plaintiffs, who went to the strong box in which the cash and securities were kept, and gave *Crowther* something, it did not appear what, and *Crowther* went away. After this *Gilbert* saw the bill for 130*l.* 10*s.* 6*d.* in the possession of the plaintiffs. The two bills for 40*l.*, and 38*l.* 8*s.* 6*d.* were produced by *Combes* at the trial, and there was no receipt upon the back of either of them. The bills upon which the action was brought were accepted in the name of

Crowther & Co., in the hand-writing of *Crowther*, and it appeared that at the time the bills were taken by the plaintiffs, they knew nothing of *Combes*, and that they made no inquiry after him until long after the bills were due, but treated *Crowther* as if he only were the person bound by the bills. The Jury found a verdict for the plaintiffs upon both bills.

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In *Michaelmas* Term last, *Ludlow*, Serjt., obtained a rule *nisi* for a new trial.

F. Pollock, and *John Jervis* shewed cause against the rule, and *Ludlow*, Serjt., supported it (a).

Cur. adv. vult.

BAYLEY, B., now delivered the judgment of the Court. This was an action by the indorsees, against the drawers, upon two bills of exchange, one dated 18th *August*, 1828, for 130*l.* 10*s.* 6*d.*; and the other, dated 5th *September*, 1828, for 45*l.* 10*s.* *Crowther* suffered judgment by default. The defence by *Combes* was—*First*, that the bills in question were not properly partnership bills, that they were not applied to any partnership purpose; that *Crowther* passed them away in fraud of the partnership, and that the plaintiffs took them under circumstances from which they ought to have inferred such fraud. And *secondly*, that *Combes* was a secret partner only; that the plaintiffs knew nothing of *Combes*; and that it was not until long after the bills were dishonoured, that they made any inquiry after *Combes*, and that they continued treating with *Crowther* after the bills became due, as if he, *and he only*, were the person whom the bills bound. *Lloyd v. Ashby* (b) was cited upon the second point, and we have

(a) The arguments turned principally upon the effect of the evi-

dence, and are therefore omitted.

(b) 2 C. & P. 138.

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since been referred to *Ex parte Bolitho* (a); but *Lloyd v. Ashby* has been re-considered by the Court of *King's Bench* (b); and in *Ex parte Bolitho*, a joint and separate trade was carried on in the name of the same individual, *Isaac Blackburn*, so that no partnership firm was pledged; and issues were directed, whether the bills he drew were drawn for the separate or joint business. Notwithstanding these cases, we are of opinion, that where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached.

It is upon the first point only, therefore, that we have had doubts. The evidence upon that point applies chiefly to the first bill. Both bills, indeed, are drawn by *Crowther*, and both indorsed by him; there is nothing upon either bill to shew that *Combes* was privy to its existence. Between *January* and *April*, 1828, *Crowther* contracted a separate debt with the plaintiffs for 80*l.*, and on the 10th *May*, 1828, the plaintiffs drew on *Crowther* at two months, for 40*l.*, and on 28th *June*, 1828, they drew a second bill upon him, for 38*l.* 8*s.* 6*d.* The first of these bills became due 13th *July*, 1828, and was dishonoured. On the 18th *August*, 1828, (the very day of the date of the first of the bills on which this action is brought), *Crowther* went to the plaintiffs with the bill for 130*l.* 10*s.* 6*d.*, and told *Gilbert*, the plaintiffs' servant, that he had a bill, for which he wanted cash. *Gilbert* shewed him in to one of the plaintiffs, who went to his strong box, in which he kept his cash and securities, and from which he gave *Crowther* something, and *Crowther* went away. *Gilbert* then saw that Mr. *Wintle* had the bill, but what he had given for it he did not know. The

(a) 1 Buck, 100.

v. *Ashby*, 10 B. & C. 288.

(b) K. B. Hil. 1831. See *Vere*

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bills for 40*l.* and 38*l.* 8*s.* 6*d.*, were afterwards in the possession of *Crowther*, and were produced by *Combes* at the trial. They had neither of them any receipt upon the back of them, and there was nothing to raise a presumption that they had ever been presented for payment. The probability, therefore, was, that they were given up to *Crowther* on the 18th *August*, when he took the bill for 130*l.* 10*s.* 6*d.* to *Wintle*; and, had the plaintiffs insisted upon retaining their verdict for these two sums (a), 40*l.* and 38*l.* 8*s.* 6*d.*, I should have thought that there ought to have been a new trial. But, as these sums are given up, is there any fair ground upon which we can consider the verdict as wrong for the residue? There is no evidence applicable to the bill for 45*l.* 10*s.*, and there is nothing to impeach the transaction upon the bill for 130*l.* 10*s.* 6*d.*, except this, that part of the produce was misapplied to *Crowther's* private debt, and that, *pro tanto*, there was a fraud upon the partnership. But does it follow that the fraud went beyond those two sums? and, because there was a partial fraud upon one bill, does it follow that there was a fraud upon the other? I do not say that the Jury might not have drawn such an inference; but can we say that they ought? One Jury did draw that inference: the Court thought they went too far in doing so, and it seems to me that the Court was right. No case goes the length to which that inference would lead. In *Shireff v. Wilkes* (b), *Hope v. East* (c), and *Green v. Deakin* (d), the private debt for which the partnership security was pledged equalled in amount the security given: the transaction was bad *in toto* if bad at all; there was no distinction between one part and another: and in *Rid-*

(a) The plaintiffs consented to reduce the verdict by deducting these two sums.

(b) 1 East, 48.

(c) Cited 1 East, 53.

(d) 2 Stark. 347.

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ley v. Taylor (a), the partnership security was adjudged to be effectually given.

We are therefore of opinion that this rule must be discharged, the verdict being reduced by deducting the two sums of 40*l.* and 38*l.* 8*s.* 6*d.*

Rule discharged.

(a) 13 East, 175.

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The tenth calf in the order of birth is the tithe calf, where the order of birth can be ascertained.

CASE against the defendant, as vicar of *Berkeley*, for not removing tithe calves (a).

At the trial before *Park, J.*, at the last *Gloucester Assizes*, the only question was, whether the tithe had been duly set out. The plaintiff insisted that the course he had pursued, of giving the defendant notice of every tenth calf *in the order of birth*, was the proper course. The defendant insisted that he was entitled to have an average calf out of the ten, and that the calves were to be kept till the tenth was weaned, that he might have an opportunity of seeing that he got a fair average calf. A verdict passed for the plaintiff; but the learned Judge gave the defendant leave to move to enter a nonsuit.

Curwood, in *Michaelmas* Term last, obtained a rule accordingly; against which cause was now shewn by—

(a) Besides counts on the mode of tithing at common law, there were counts (and evidence was given applicable to them) on a special custom of tithing in the parish of *Berkeley*; but as the custom proceeded on the order of births, exactly the same question arose at common law and on the custom; for if the mode of setting out the tithe was bad at the com-

mon law *for the reasons alleged*, the custom could not have been supported. As it was agreed by the counsel on both sides that the custom made no difference in this case, and the judgment of the Court did not at all proceed upon the custom, it has been thought proper not to incumber the report with any statement of the pleadings and evidence relative to the special custom.

Ludlow, Serjt.—The objection is, that the tithe was not properly set out. There is no dispute as to the time at which the animals are titheable, for it is clearly when they can live on the natural food of the mother: but the mode of setting out the tithe is the matter in controversy. The common law mode of tithing calves is by the tenth calf in the order of birth. The cases which were cited at the trial, and will probably be relied upon in argument, are inapplicable to this question. *Welch v. Uppill* (a) merely shews that the right to tithe of calves and lambs vests when the animals are dropped, but that they are not titheable till of a proper age to be weaned. *Knight v. Halsey* (b), and *Halliwell v. Trappes* (c), merely decided that the parson ought to have the opportunity of inspecting predial tithes; and the right of the parson to inspect is not founded on the common law, but is given by the statute 2 & 3 Edw. 6, s. 2, which only applies to predial tithes (d).

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The case of *Bearblock v. Tyler* (e) was also relied upon. In that case, there were thirty calves, all of which were sold by the farmer a few days after their birth, and a tenth of the sums for which the calves were sold was tendered to the parson; but there was nothing to ascertain the order of birth, and no notice appears to have been given to the parson. With respect to lambs, which are all dropped about the same time, the rule may well be, that the parson shall have an average tenth at the time at which they are titheable, *viz.* at the time at which they are able to live without their mothers; but it would be impossi-

(a) 3 B. Moore, 330; 1 B. & B. 84; 3 E. & Y. 963.

(b) 7 T. R. 86.

(c) 2 Taunt. 55; 2 N. R. 173.

(d) Which enacts, "At all times whensoever and as the said predial tithes shall be due, and at the tithing time of the same, it be law-

ful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts, &c. &c."

(e) 1 Jac. 560.

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ble to hold that calves were so titheable, because calves are dropped at different periods of the year; and if all must be kept until the whole can live upon the natural food of the mother, the inconvenience to the farmer, especially in a dairy country, would be incalculable. The absurdity of the proposition is an answer to the argument; but the authorities are also opposed to the rule contended for. Thus, it is laid down that the *tenth* calf is due to the parson of common right, to be taken when it is weaned, and not before (a). In *Com. Dig. Disme* (H. 6), it is said, "By another canon, *incerti temporis, Agni, vituli, pulli, equini, et alii fœtus decimales, decimentur habitatione ad loca ubi nutriuntur et oriuntur.*" Now, to decimate, is to tithe or select a tenth, and not to give an undivided tenth in every ten animals.

Again, Mr. *Eagle* (b), in his law of tithes, says, "As to the question which particular calf is to be given to the parson for tithe, it is to be observed, that, as calves are produced at different times of the year, and are usually taken from the cows and sold from time to time, there can be no opportunity, as there is in the case of lambs, of comparing them and making choice of a calf which is of an average quality and value; and, therefore, as it seems, the tenth calf is to be paid in the order in which they are calved. Indeed, this seems to be the regular mode of tithing young animals in general, although, for obvious reasons, it cannot be adopted in rendering the tithes of lambs and pigs." And in a note from *Rebuffus, Quæst. 6, 29*, he states what seems to have been the rule of the canon law on this subject: "*Decima fœtus in ordine nascendi, cognoscitur, et decimo natus debetur, si vero non appareat quis sit decimus, tunc mediocris præstetur.*" The rule, therefore, is, that, if the tenth be known, it is to be taken;

(a) *Gibs. Cod.* 708; 3 *Burn's Eccl. L.* 498.

(b) 1 *Eagle, L. T.* 369.

but, if that cannot be ascertained, then an average animal is due. The parson then is entitled, not to an undivided tenth part of the ten animals, but to the tenth born; and the doctrine of average only applies to the cases where the order of birth is not ascertainable. Now, the common and the canon law are, upon this subject, for the most part the same; for it is laid down, *Com. Dig. Disme* (H. 6), that "The manner of payment by the common law is generally conformable to the canon. *Semb. Cro. Car.* 408." If so, the passage from *Rebuffus* would decide this question. In other cases, likewise, a similar rule obtains; of milk, the whole meal of the tenth day is due and payable, and of wool, the tenth fleece. In these cases, the parson does not have the tenth of each meal and of each fleece, but the titheable matter being capable of ascertainment, he has the whole meal of the tenth day, and the whole of the tenth fleece. The right of comparison exists only where, from the nature of the titheable commodity, an average is to be taken; but that right does not exist where, by law or custom, the particular animal is defined.

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Curwood, contra.—There is no case which precisely decides the point in question. It is necessary, therefore, to have recourse to the common law principle upon which cases as to the mode of tithing other articles have been decided, and to reason by analogy from those cases. The question is, whether the calf ought to be ascertained at the time of birth, or at the time of setting out. The *modus exponendi* is alone in dispute. Now the mode of ascertaining the tithe calf at the time of birth is bad upon the principles of the common law, because it has a direct tendency to fraud. It is an incitement to the farmer to take little or no care of the parson's calf during the period he has to keep it till it is fit to be separated from the mother. It would naturally lead the farmer to abstract the milk on which the calf ought, during that time, to be nurtured. And the parson has a right to have the opportunity of ascer-

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taining by inspection that the calf set out for him has been fairly dealt with, and that he has a fair average calf. *Tenant v. Stubbing* (a). He had this right at common law, and it was not conferred, as was said by the statute of *Edw. 6*, which only extended the common law right of the parson to the lay impropriators who had then lately become entitled to tithes. *Wilson v. The Bishop of Carlisle* (b).

There are many cases in which the principle that the tithe could not be marked out or designated before the time of setting it out has been acted upon. *Knight v. Halsey* (c) is a leading case upon this subject. There a custom to set out tithes of hops by the tenth row, or by the tenth hill where the rows were unequal, was holden bad, because it might lead to fraud; because the parson's row or hill might be foreknown, and the grower might be induced to manure less, or otherwise neglect the parson's row or hill. So, setting out by the tenth ridge of corn, beginning from the church (d), the tenth acre of wood (e), or the tenth apple-tree (f), have all been held to be bad modes of tithing, on the same principle. Now, the same principle applies strongly to the present case, for the more the farmer can deprive the tithe calf of its sustenance, the more he gains.

With respect to the young of animals, the cases are equally at variance with the plaintiff's proposition. If the tenth born animal was the parson's by right, there would be some case to that effect, and the modes of tithing lambs in particular parishes, as by passing them through a wicket and the like, would not be law (g). The tithe of lambs is

(a) 3 Anst. 640; 2 E. & Y. 1438.

(b) 1 Hob. 107; 1 E. & Y. 250.

(c) 7 T. R. 86; 2 B. & P. 172; 2 E. & Y. 438.

(d) *Stebbs v. Goodluch*, 1 Leon. 99; Moor, 913; 1 E. & Y. 93.

(e) *Knight v. Halsey*, 7 T. R. 86; 2 B. & P. 172; 2 E. & Y. 438.

(f) S. C. 2 B. & P. 205.

(g) 3 Burn's E. L. 383. No particular mode of tithing lambs is pointed out by the common law;

not perfected in the parson until the lambs are severable from their dams. So, with respect to calves, although the parson has an inchoate right immediately upon the calf being dropped, that right is not perfected until the period at which by law the calves are titheable. If the right were perfected when the calves were dropped, and they should die before the weaning time, the parson would be the loser. But there is no sound reason for a distinction between the tithe of calves and lambs. It is true that the mode contended for may embarrass the farmer in the improved state of farm husbandry; but this is no ground for disturbing the law. This and the other difficulties of the rule did not escape the observation of Sir *Thomas Plumer* in the case of *Bearblock v. Tyler* (a). He says, "When these thirty calves were born, the tithe-owner was entitled to *some three* of them; I say *some three*, because, till they are set out, *he cannot have a right to any particular ones; but he has a general inchoate right to three*: they are his property, and the farmer is bound to set them out for him; the farmer cannot sell them; for, if he does, he sells three that belong to the tithe-owner." "The law," he adds, "says that he (the parson) is to receive the animal not *instantly* on the birth, but when it can reasonably maintain itself;" and he proceeds, "the consequence of this rule may, perhaps, sometimes prove troublesome, and occasion inconvenience on both sides; the farmer, if he is desirous to sell, must make an agreement with the tithe-owner, otherwise they must wait the period at which the one is bound to set out and the other to take the tithe." The result then of the cases seems to be, that the parson is entitled to a fair tenth of the subject titheable at the period at which the tithe is set out; and that, in order to ascertain that he has a fair aver-

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but it is regulated by particular custom, the validity of the custom depending upon this, whether it

gives the tithe-owner the full tenth of the lambs in number and value,

(a) 1 Jac. 566.

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age, he has a right to view the bulk of the subject titheable. A mode of tithing which may lead, or operate as an inducement, to fraud is void, and cannot be supported.

Cur. adv. vult.

BAYLEY, B., now delivered the judgment of the Court. This was an action against a tithe-owner, the vicar of *Berkeley*, for not taking away his tithe calves; and the only question was, whether they were duly set out.

The plaintiff insisted that the tenth calf in order of birth was the tithe calf, and as each tenth calf was dropped he gave the defendant notice.

The defendant insisted that the plaintiff was to keep all his calves till there was a tenth, in order that the defendant might have an opportunity of seeing all the calves together; and that then the plaintiff was to set out for him one of the ten, of an average goodness with the rest; and he relied first on the practice of tithing hay and corn, &c., where the whole ten parts must be left till the parson may have the opportunity of seeing whether what is set out for him as the tenth is really a tenth; and, secondly, upon an expression of Sir *Thomas Plumer* in the case of *Bearblock v. Tyler*.

Where tithe is to be taken of what constitutes an entire crop, and where all ten parts are produced at the same time, and prepared at the same time and in the same manner, it is no unreasonable restraint upon the farmer to be obliged to leave his nine parts upon the land till the tithe-owner may have the opportunity of seeing the whole; and it is only a reasonable security for his being fairly dealt with to require that he should.

But is there any analogy between the case of hay and corn, and that of calves? Calves may be dropped at different periods of the year, and there may be a very long interval between the earliest and the latest. If, for in-

stance, nine are dropped in *March*, and the tenth in *December*, is the farmer to be compelled to keep the nine till the tenth is dropped? Would it not be most unreasonable that he should?

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Again, though the tithe is due the moment the calf is dropped, the farmer is bound to keep it until it will of itself live upon what is the natural food of its mother. Is the farmer to be bound to keep the other nine in the same way? He may wish to sell his nine that they may be suckled by other cows, or he may wish to dry nurse his own. Why should he be restrained from so doing?

If the law has restrained him he must submit; but when the question is, whether the law has or has not restrained him, the inconveniences which would result from the restraint ought to be considered.

We must, therefore, see whether the law has restrained him. *Gibson*, 709, says, the tenth calf is due to the parson of common right; and *Burn*, in his *Ecclesiastical Law*, adopts the same rule from *Gibson*. *Gibson* lays down the same rule with respect to colts, 708.

In an anonymous case in *Brownlow & Gouldsborough's Reports*, 126 (a), dower was demanded of the third part of the tithes of wool and lambs; and it was demanded how the Sheriff should deliver seisin; and the Court held the best way was to deliver the third of the tenth of the wool, and the third tenth lamb, that is, the thirtieth lamb.

In an anonymous case (b) a custom was alleged as to lambs, (as to which the times of birth are nearer, and there is likely to be more difficulty in ascertaining the order of birth), that, if there were seven, eight, or nine, the parson should have the seventh, eighth, or ninth upon certain terms; and if there were ten, the parson should have the tenth; and *Berkeley and Jones, Ja.*, said, the canon law was so, and so received in the Spiritual Court. In

(a) Mich. 9 Jac. 1.

(b) Cro. Car. 403.

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Ernste v. Watts (a), upon a bill to establish moduses and modes of tithing, that as to the tithe of calves was, the vicar to have every tenth calf in kind; and where there were but seven, the vicar to have every seventh, paying &c.; and this mode was confirmed and established. In *Brinklow v. Edmunds* (b), a custom was established, by which, as there alleged, if the parishioner had ten lambs, the tenth was due to the rector on St. Mark's day, and if there were seven, eight, or nine, then he was to have one; but the authority of that case is weakened by what is also stated in the same case, that, if there were ten, the parishioner was to choose two, and then the rector was to choose his. In *Bell v. Curson* (c), a custom was stated for the inhabitants, having ten calves, to pay one, and, if seven, to pay one. So, *Gibson*, 708, states a custom as good, where, if there be seven, the parson shall have one.

The reason why I refer to these customs is, to shew that the payment of a specific calf as the seventh, eighth, or ninth, is not unreasonable; for the ground insisted on by Mr. Curwood was, that, by paying a specific calf the farmer was enabled to practise fraud on the tithe-owner, and the tithe-owner was liable to be cheated by the conduct of the farmer. These modes of tithing, which were established to be good, are instances to shew that there is nothing unreasonable in such a manner of setting out tithe. *Comyns*, in his *Digest*, sets out a provincial canon, anno, 1305, as to lambs, by which, if there be seven, *septimus detur rectori, qui tres obolos solvat parochiano; si rector octatum recipit, det denarium; si novum, det obolum, aut expectet ad alium annum si maluerit, et tunc habeat secundum aut tertium agnum sequentis anni* (d); but this part, says *Comyns*, of waiting till another year, is not according to the common law, which requires

(a) Hil. 4 W. & M.; 1 Wood, 304.

(b) Bunbury, 308.

(c) Hil. T. 8 W. 3; 1 Wood, 377.

(d) Com. Dig. Dismes, (H. 6).

an annual payment of tithes. It should seem, therefore, that *Comyns* approved of the residue of this canon, and considered it as agreeing with the common law of *England*.

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Lastly, Mr. *Eagle*, in his *Law of Tithes* (a), refers to a passage in *Rebuffus*, also noticed in a curious reading upon the law of tithes in the possession of my brother *Bolland*. This passage may, perhaps, reconcile every thing upon this subject: "*Decima fœtus in ordine nascendi cognoscitur et decimo natus debetur: si verò non appareat quis sit decimus, tunc mediocris præstetur.*" If you know which is the tenth, then that particular animal belongs to the parson, but if the tenth cannot be ascertained, he is to have one of the ordinary quality. This, as it seems to me, is a plain intelligible rule. If the order in which they are born is ascertained, the tenth, and the tenth only, is the parson's right. If, from the closeness of the times at which different calves or other animals are dropped, or if, from other causes, it cannot be or is not ascertained which was the tenth, the parson shall have neither the best calf nor the worst, but one which may fairly be deemed an average calf. And this may, perhaps, reconcile the expressions of Sir *Thomas Plumer* in *Bearblock v. Tyler* (b). In that case there were above thirty calves, and there was nothing to shew in what order they were born. There was no notice to the tithe-owner to specify which were his; and all were sold a few days after their birth. Sir *Thomas Plumer* might well say, under these circumstances, that the tithe-owner was entitled to *some* three of them; but until they were set out, he could not have a right to any three in particular. Upon the whole, therefore, we are of opinion that where the order of birth is ascertained, as it has been here, and the parson is immediately apprised which is his, so as to

(a) Vol. 1, p. 370.

(b) 1 Jac. 566.

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remove all suspicion of unfairness, the tenth is the only calf to which he is entitled, and, consequently that the present action is maintainable against the defendant for not taking it away. Let it also be remembered, that, if what I have mentioned be the rule, and the farmer chooses, as he may, to dry nurse the other nine, the parson has this benefit, that he is entitled to the tithe-milk so soon as the calves are weaned.

Rule discharged.

DOE v. ROE.

*A notice at the foot of a declaration in ejectment, served before term, which omits to state the term in which the tenant is to appear, is sufficient.

ON motion for the common rule for judgment against the casual ejector, it appeared that the notice at the foot of the declaration, which was regularly served before the term, omitted to specify the term in which the tenant was to appear.

BAYLEY, B.—The notice to appear generally, where the declaration is served before the term, cannot mislead, and is a sufficient notice to appear in the next term.

Common rule granted (a).

(a) See *Doe v. Graves*, 2 Chit. Rep. 172.

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YOUNG and Another, Assignees of IRELAND v. TIMMINS
and Another.

ASSUMPSIT for work and labour, &c., by the bankrupt. Plea—General issue, with notice of set-off on the promissory note stated below.

The cause was referred, by order of *Nisi Prius*, to a barrister, who ordered a verdict to be entered for the defendants, and made a special award.

A promissory note for 300*l.*, given by the bankrupt to the defendants, the agreement set out below, and a bond, conditioned for the performance of the agreement, were annexed to the award, and were found by the arbitrator. The agreement was as follows:—

“Memorandum of agreement, made and entered into on the 20th day of *January*, 1826, between *James Willis Timmins* and *Samuel Timmins*, of *Birmingham*, in the county of *Warwick*, general factors and copartners, of the one part; and *George Ireland*, of the same place, working brass founder, of the other part:—Whereas, the said

By an agreement, reciting that *A. B.* and *C. D.* had for some time past employed, and then did employ *E. F.* in executing the orders which they from time to time received; and also reciting that *A. B.* and *C. D.* had requested *E. F.* to enter into an agreement to work in his trade or business, and to execute the orders of *A. B.* and *C. D.*, in manufacturing and making goods in the way of his trade, for the said *A. B.* and *C. D.* alone,

to which he had consented, in consideration of his past employment, and also, of the undertaking of *A. B.* and *C. D.* to continue to employ him as *theretofore*:—*A. B.* and *C. D.* agreed with *E. F.*, that they would, during the joint lives of themselves and *E. F.*, continue to employ him in executing their order as *theretofore*, and upon the like or other usual terms, subject nevertheless, to the provisoes and agreements thereafter mentioned; and *E. F.* agreed with *A. B.* and *C. D.* that he would, during the joint lives of *A. B.* and *C. D.*, work for and execute their orders for them as he had been accustomed in his trade or business, in a good and workmanlike manner, and at general and proper prices or terms; and that he would not at any time work for, or execute or cause to be executed, the orders of any person or persons whomsoever, in his trade or business, without the consent in writing of *A. B.* and *C. D.*, which consent should be necessary upon every distinct occasion, and should contain the address of the person or persons for whom he might thereby be permitted to be employed, and also the specific work which he was thereby permitted to perform: but it was provided and agreed, that in case *A. B.* and *C. D.* should at any time be desirous to put an end to that agreement, and should give, or cause to be given, at least three months' notice in writing to *E. F.*, the agreement should be considered as at an end and determined: provided also, that in case the said *A. B.* and *C. D.* should at any time have occasion or be under the necessity, by reason of the urgency or extent of orders, or *should otherwise think fit*, they should be at liberty to employ any other person or persons to execute orders for them in the trade or business of *E. F.*; and that, without thereby releasing *E. F.* from his agreement therein contained of exclusively working for the said *A. B.* and *C. D.*; and it was provided that nothing therein contained should be taken to restrain or prevent *E. F.* from executing the orders of any person or persons residing in the city of *London*, or within six miles thereof:—*Held*, first, that this agreement, being in partial restraint of trade, and not having an adequate consideration to support it, was void.—And secondly, that a promissory note given by *E. F.* to *A. B.* and *C. D.* in consideration of breaches of the agreement, in working for other persons, was also void, and could not be set off by *A. B.* and *C. D.* in an action against them, at the suit of the assignees of *E. F.* for work done.

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J. W. Timmins and *S. Timmins* have for some time past employed, and do now employ the said *G. Ireland*, in executing the orders which they have from time to time received for brass foundry; and whereas the said *J. W. Timmins* and *S. Timmins* have requested the said *G. Ireland* to enter into such agreement as is hereinafter mentioned, to work in such his trade or business aforesaid, and to execute their orders by manufacturing and making goods in the way of his trade, for the said *J. W. Timmins* and *S. Timmins* alone, to which he the said *George Ireland* did consent, in consideration of such his past employment, and also of the undertaking of the said *J. W. Timmins* and *S. Timmins*, to continue to employ him the said *G. Ireland* as heretofore. Now these presents witness, that, in pursuance of the said agreement, and for carrying the same into effect, they the said *J. W. Timmins* and *S. Timmins* do hereby severally and respectively agree with the said *G. Ireland*, that they, the said *J. W. Timmins* and *S. Timmins*, shall and will, during the joint lives of themselves and the said *G. Ireland*, continue to employ the said *G. Ireland* in executing their orders in brass foundry as heretofore, and upon the like or other usual terms, subject, nevertheless, to the provisions and agreements hereinafter mentioned. And the said *G. Ireland* does hereby agree with the said *J. W. Timmins* and *S. Timmins*, in manner following (that is to say), that he the said *G. Ireland* shall and will, during the joint lives of them the said *J. W. Timmins* and *S. Timmins* work for and execute the orders of the said *J. W. Timmins*, and *S. Timmins*, as he has heretofore been accustomed to do in his said trade or business of a brass founder, in a good and workmanlike manner, and at general and proper prices or terms; And further, that he shall not nor will at any time work for or execute, or cause to be executed, the orders of any person or persons whom-

soever, in such his trade or business of a brass-founder as aforesaid, without the consent in writing of the said *J. W. Timmins* and *S. Timmins* first obtained for that purpose, and which consent shall be necessary upon every distinct occasion, and shall contain the address of the person or persons for whom he may thereby be permitted to be so employed, and also the specific work which he is thereby permitted to execute or perform: Provided always, and it is hereby declared and agreed by and between the said parties hereto, that, in case the said *J. W. Timmins* and *S. Timmins* shall be at any time minded or desirous to put an end to this agreement, and of such their mind or desire shall give, or cause to be given, at least three months' notice in writing to the said *G. Ireland*, then and in that case, and from and after the expiration of such notice, this agreement shall be considered as at an end and determined, any thing hereinafter contained to the contrary thereof in anywise notwithstanding. Provided also, and it is hereby further agreed, that, in case they the said *J. W. Timmins* and *S. Timmins* shall at any time have occasion, or be under the necessity, by reason of the urgency or extent of orders, or shall otherwise think fit, they shall be at liberty to employ any other person or persons to execute orders for them in the trade or business of a brass-founder, any thing herein contained to the contrary notwithstanding; and that, without thereby releasing the said *G. Ireland* from his agreement herein contained, of exclusively working for the said *J. W. Timmins* and *S. Timmins*: And provided moreover, and it is hereby lastly agreed, that nothing herein contained be taken to restrain or prevent the said *G. Ireland* from taking or executing the orders of any person or persons residing in the city of *London*, or within six miles thereof, but that the said *G. Ireland* shall be at liberty to solicit and get up the orders of any such person so residing as aforesaid,

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in the same manner as he would in case these articles of agreement had not been entered into, any thing herein contained to the contrary thereof in anywise notwithstanding."

The award then stated, "touching the effect of the said agreement upon the mode of dealing between the said bankrupt, and the said defendants, that, if the said bankrupt, *G. Ireland*, had continued to trade with the said defendants upon the terms upon which these parties originally dealt, without those terms being altered by the said agreement, there would, upon the account at the close of it, have been due from the said defendants to the bankrupt, the sum of 52*l.* 9*s.* 8*d.*; and that, if the said bankrupt and the said defendants were to be considered as trading after the execution of the said agreement and not upon the terms upon which they originally dealt, but on the usual terms of the trade, there then would have been due upon the account at the close of it, from the said defendants to the said bankrupt, the sum of 11*l.* 10*s.* 7*d.*, and that the said promissory note was given independently of the account, and in consideration of breaches of the said agreement, committed by the said *G. Ireland* before his bankruptcy, in working for several individuals in manner as prohibited by the said agreement, and that several instances of such breaches in working for customers of the defendants, in manner as prohibited by the said agreement, were proved before the said arbitrator."

A rule *nisi* was obtained last *Michaelmas* Term, by *Waddington*, to set aside this award, and enter a verdict for the plaintiffs, against which cause was now shewn by—

The *Attorney-General*, *Goulburn*, Serjt., and *Hill*.—The introductory part of this agreement states, that the bankrupt had been previously employed by the defendants; he must therefore have been fully aware of the na-

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ture, extent, and value of their employment, and such employment was a sufficient consideration for the restraint in question. It is clear, from the agreement, that the defendants were to furnish reasonable employment. But the present is not within the class of cases as to restraint of trade, either general or partial. It is on the contrary in furtherance of trade. These parties were not rivals in trade, but the interest of each was concurrent. The bankrupt was to employ his talents for the benefit of the public, through these defendants, who were factors; and it was for the interest of both parties that the trade should be carried on to the greatest possible extent. If an agreement, by a servant or agent, of this nature, to work for one employer only, were invalid, it would be difficult to say how the common contracts of hiring and service, which, to confer a settlement, must always exclude the working for any body else, can be supported; but in all the settlement cases which have been decided on such contracts, it has never been supposed that they were void as being in restraint of trade, or against public policy.

But if this agreement be construed to be in any degree in restraint of trade, it is merely a restraint within certain limits. It can hardly be said, that the exception of the metropolis is colourable, and, at all events, the arbitrator not having found that fact, it cannot now be assumed. The question, whether such exception is or is not colourable, is one which may be ascertained; but when such exception is *bond fide*, it is impossible for the Court to decide, on the ground of the limits being reasonable or unreasonable. How can the Court ascertain this? Would it be said, that an exception of one or two counties is unreasonable, but one of three or four reasonable. The impossibility of drawing any such line shews that the only question which can be raised as to the extent of the exception is, whether it be colourable or not.

According to the fair construction of the whole of the

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instrument taken together, the liberty of the defendants to employ other persons must depend on the necessity and urgency of orders. They had agreed to employ *Ireland* as theretofore, and, coupling that stipulation with the liberty of employing others, it means that they must still employ him, but that, under pressure or urgency of orders, they might also employ others.

[*Bayley, B.*—Suppose that *Ireland* had sued them for not employing him, would not his complaint be answered by their saying that they thought fit to employ others?]

No, for by the previous part of the agreement, they were bound to employ him according to the prior employment, and in the same mode as theretofore. The words “or should otherwise think fit,” must be construed by reference to the other parts of the instrument; as, in construing an act of Parliament, general words at the end of a clause are frequently held to be restrained by reference to the preceding parts. In the act for the better observance of the Lord’s day (*a*), for instance, the general words “or other person whatsoever,” have been construed to be restrained by the particular preceding enumeration, and only to include persons *ejusdem generis*, and not to apply to trades which have been introduced since the statute.

The principle to be collected from the cases of *Mitchell v. Reynolds* (*b*), *Chesman v. Nainby* (*c*), *Bunn v. Guy* (*d*), *Davis v. Mason* (*e*), *Homer v. Ashford* (*f*), and *Wickens v. Evans* (*g*), seems to be, that, though for a partial restraint of trade there must be some consideration, yet the Courts cannot enter narrowly into the extent of such consideration. In *Davis v. Mason*, Lord *Kenyon* says, “I do not see that the limits are necessarily unreasonable, nor do I

(*a*) 29 Car. 2, c. 7.

(*b*) 1 P. Wms. 181; 10 Mod.
130.

(*c*) 2 Stra. 739, Ld. Raym.
1456, Bro. Pail. Cas. 349.

(*d*) 4 East, 190.

(*e*) 5 T. R. 118.

(*f*) 3 Bing. 322.

(*g*) 3 Y. & J. 318.

know how to draw the line." In the present case there is surely some consideration; and, considering the nature of the trade, the limits do not seem more unreasonable than in the case of *Davis v. Mason*, and many of the other cases which have been cited on this subject.

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But, *secondly*, it remains to be seen, how far the promissory note is affected. Does it follow, even if the agreement were void, that, the parties having had differences, and having made a settlement, and ascertained the sum which was due, and that sum being secured by a promissory note, the defendants cannot recover on such promissory note, or rather cannot retain on such note? for the present remedy they seek on the note is in the nature of a retainer, rather than of a recovery. It makes a considerable difference in such case, that the parties seek to set off or retain, and are defendants, and not suing upon the note. This case is much stronger for the defendants than the mere settlement of an account. In *Skyring v. Greenwood* (a), and in *Shaw v. Picton* (b), it was held, that a settlement of the accounts was binding upon the parties. A doubtful right has always been held a good consideration. The question in the present case must at least be admitted to be doubtful. Then, if parties meet and make a settlement of a doubtful right, such settlement must be binding, or else parties must always bring such points before a Court of law for its adjudication. There is also a good moral consideration for this promissory note; for the defendants had always performed their part of the agreement, and *Ireland* had broken his. He was therefore morally bound; and a moral obligation is a sufficient consideration to support an *assumpsit*.

Adams, Serjt., and Waddington, contra.—Agreements

(a) 4 B. & C. 281; 6 D. & R. 201; and see *Shaw v. Dartnell*, 6 401; 1 C. & P. 517, S. C. B. & C. 56; 9 D. & R. 54, S. C.

(b) 4 B. & C. 715; 7 D. & R.

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in restraint of trade are *prima facie* void and illegal; *Mitchell v. Reynolds* (a); and it lies on the party setting them up to shew an adequate consideration. To support a restraint of this nature, the restraint must be partial, the consideration must be adequate, the agreement must be mutual, and the obligation must be co-extensive. In the present case the restraint is general, and the exception of *London* is merely colourable. There was no adequate consideration. The agreement was unilateral: the bankrupt gained nothing by it. In *Gale v. Reed* (b), the party restrained had a stipulated benefit for the restraint, but there is no co-extensive or mutual obligation in the present case. *Gale v. Reed*, which was the case of a workman, a rope-maker, employed in the same manner as in the present case, disposes of the alleged distinction between the common case of a restraint of trade, and of a manufacturer being restrained to work for particular persons. In that case it was not doubted but that the agreement would have been void as in restraint of trade, if it had not been supported by an adequate consideration. The past services could be no good consideration for the restraint in question, and it is manifestly unjust and unreasonable that *Ireland* had not, as well as the defendants, the means of determining the agreement.

The true distinction in cases of this nature is, “between contracts *with* and *without* consideration; and wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained.” So, in *Wickens v. Evans* (c), Mr. Baron *Vaughan* observes, “this is an honest and upright contract, which has been the question in all the cases.” It is impossible to say that this contract was honest, fair, or reciprocal. It is clear, in

(a) 1 P. Wms. 196.

(b) 8 East, 80.

(c) 3 Y. & J. 330.

this case, that *Ireland*, in point of fact, was not adequately furnished with work by the defendants, for it is not said that he did not execute their orders; and the breaches of which they complain, namely, his executing the orders of others, shew that he was not adequately employed by them. But the bankrupt could have had no possible legal remedy on this agreement, if not furnished with adequate employment by the defendants. The proviso would have been a clear answer to any action by him against the defendants for not employing him sufficiently.

[On the point as to the promissory note, the Counsel for the plaintiffs were stopped by the Court].

Lord LYNDHURST, L. C. B.—I am of opinion, that this agreement cannot be supported. Where one party agrees with another to employ him, and the latter agrees not to work for any third person, such agreement is a partial restraint of trade, and must be supported by an adequate consideration. The question then, in the present case, is, whether there is an adequate consideration for the stipulations in this agreement on the part of the bankrupt. The terms are, that Messrs. *Timmins* should employ *Ireland* in the way of his trade, as heretofore. Supposing their business to decline, in what situation does *Ireland* stand? He is not allowed to solicit orders for himself, and they may not have sufficient business to employ him. He must therefore remain idle. But further, they are to employ him as “heretofore, subject, nevertheless, to the provisions and agreements hereinafter mentioned.” Amongst others, that they should be at liberty to employ any other person or persons without thereby releasing him from his agreement of exclusively working for them. It does appear to me that this, coupled with the other clauses, places *Ireland* entirely at the mercy of the Messrs. *Timmins*, and that there is no adequate consideration for this agreement to work exclusively for the defendants.

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On the second point I entertain no doubt. If the agreement fails, the consideration of the note fails also. As to the third point, I am of opinion, that the plaintiffs cannot repudiate the agreement, and at the same time have the benefit of it. They must, therefore, recover, according to the usual terms of the trade, and not take advantage of the larger terms to which *Ireland* was entitled under the agreement.

BAYLEY, B.—I am of opinion that there is no sufficient consideration to support this agreement, though only in partial restraint of trade. The agreement is, not to work for any other person, without the specific consent in writing of the defendants, to be obtained on every occasion, with the exception of persons residing in *London*, or within six miles thereof. The restraint in this case, from the nature of the business carried on, was a restraint not only of the party's own exertions in trade, but of the numerous workmen whom a tradesman of this description must necessarily employ. The restraint, is prejudicial to the individual restrained, and to the rights of the public; for every man has a right to the fruits of his own unrestricted exertions, and the public have a right to the benefit which they may derive from such exertions. We are, therefore, to see whether there is any adequate consideration for the restraint in question. The bankrupt was restrained from working for any person other than the defendants, except in *London*, or by their permission, and they are at liberty to judge whether they will grant such permission or not. Now, is there any reasonable consideration for *Ireland's* being restrained in this manner? If I could find in this agreement any obligation on the part of the defendants to furnish *Ireland* with an adequate quantity of work, I should say that there was an adequate consideration; but if there is nothing in this agreement to oblige them to furnish an adequate quantity of work, and especi-

ally if it appear probable, from the nature of the instrument, that it may happen that *Ireland* might be left without sufficient employment by the defendants, then the consideration in this case fails.

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It was well put on the part of the plaintiffs, that the proper test for trying the present question is, by considering whether *Ireland*, not having sufficient employment from the defendants, could maintain an action against them for not furnishing him with work. If he could maintain such action, I should think that there was an adequate consideration for this restraint; if he could not, I should think the consideration not adequate.

It appears from the recital, that *Ireland* was employed to execute the orders which the defendants received for brass foundry, and he agrees to manufacture for them alone. It manifestly appears that the bankrupt's employment was to depend upon the orders which the Messrs. *Timmins* should from time to time receive. If they received no orders how was he to be employed? He could solicit no orders in his own neighbourhood without the defendants' consent, which they were at liberty to withhold.

But the defendants do not stipulate, that they are to employ the bankrupt on all the orders which they receive; for they are to be at large; they are at liberty to employ any other person or persons *by reason of the urgency or extent of orders*, or if they *should otherwise think fit*. Even the liberty to employ others might greatly interfere with *Ireland's* employment; for, if they received orders which would have kept him in employment for a month, by such orders being distributed to him and others, he might only be employed for a few days. But further, the defendants are to be at liberty, not only *if occasion should require*, but *if they should otherwise think fit*; so that their liberty is not confined to an urgency of orders, but

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is to be exercised as they think fit. Suppose the defendants had found some other workman, and had thought fit to withdraw their work from the plaintiff, and give it to the other workman, what a situation the plaintiff would have been in. If the plaintiff were out of employment for six months, could he have maintained any action? The first answer would have been, we have had no orders to be executed. The second answer might be, we have employed other persons as we thought fit. There is certainly the expression, "as heretofore;" but, at all events, the extent of the employment was confined of necessity to the orders to be received by the defendants; and, I am therefore of opinion, that this is a partial restraint of trade, but that there is no adequate consideration, so as to give the defendants a right to insist on the set off in question.

The next point is—whether, giving the note for the amount of the breaches of the agreement was conclusive, and enforced *Ireland* to submit. I quite agree that a promissory note imports a consideration *prima facie*, but I cannot agree that it is equivalent to payment. I think, that when the payee is called on to make payment contrary to public policy, he is not obliged to pay, but that he is at liberty to prove the facts which shew that such payment ought not to be made. I am therefore of opinion, on the second point, that the consideration of this note was sufficiently impeached, and therefore, that the defendants could not set it off in this action.

The remaining question is, what is the amount to be recovered. The arbitrator has found, that, if the dealings had continued on the terms upon which these parties originally dealt, there would have been due 52*l.* 9*s.* 8*d.*, but we do not know what those terms were. They may have been higher on account of an exclusive employment. It is impossible to say why they receded from those terms; it

may be conjectured that they receded from them on the terms of the new agreement. If the assignees repudiate the agreement, why should the parties be deemed to have been dealing on the old terms? We cannot know that they would have continued to deal on those terms. What terms then can we say that these parties were dealing on, except the usual terms of the trade? Those terms entitle the present plaintiffs to recover 11*l.* 10*s.* 7*d.*

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VAUGHAN, B.—I am of the same opinion. It seems to me that there is no difficulty in applying the law the moment we have ascertained the facts. *Mitchell v. Reynolds* (a), and *Chesman v. Nainby* (b), are the leading cases on this subject, and the principles of the law are there laid down in a manner that cannot be mistaken. It is clear, that a general restraint of trade is void; it is equally clear, that a partial restraint of trade may be good or may be bad, and that the question whether it is good or bad depends on the adequacy of the consideration. From the end of the case of *Mitchell v. Reynolds*, it appears that the Courts will consider whether the restraint of trade is fair and reasonable under the circumstances; and that must be collected from the particular instrument. Upon the whole of the agreement now before the Court, it appears to me, that the present is a partial restraint of trade, and that there is no adequate consideration for such restraint of trade. The defendants are to employ *Ireland* “as heretofore,” subject to the proviso which has been stated. The Messrs. *Timmins* might, under this proviso, determine the employment; but there is no reciprocal power of determining the agreement on the part of *Ireland*; and the agreement is, on this point, manifestly unjust. Either from the urgency of orders, or as they might otherwise think fit, the defendants were to be at liberty to employ

(a) 1 P. Wms. 181; 10 Mod. 130.

(b) 2 Stra. 739; S. C. Ld. Raym. 1456; Bro. Parl. Cas. 349.

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other persons, and that without releasing the plaintiff from his agreement to work for them exclusively. It is impossible to read this instrument without seeing that it leaves *Ireland* completely at the mercy of the defendants. It is clearly unjust that they should be left at liberty to employ other persons without any reciprocal liberty to *Ireland*. The restraint is, therefore, void; and, if that be void, then the promissory note which was taken to secure the damages for the breaches of this void agreement must be also void. The plaintiffs cannot, however, repudiate this agreement, and take the benefit of it; and they are, therefore, entitled only to recover the smaller of the two sums.

BOLLAND, B.—This is an agreement between persons in the situation of factors, and another person who was a workman; and the stipulation was, that the latter should work for the former exclusively, within certain limits. They claim a large right over this person; and I am of opinion, that, to maintain such a restraint, there ought to be a mutuality between the parties. Where the work is merely dependent on the personal skill of one person, and the restraint can only operate to the loss of that one person, such restraint is not so prejudicial to the interests of the public; but, where the person restrained is in the situation of a manufacturer of this description, who must necessarily keep a number of men in his employment, to be put on any work in which he should be employed, it becomes a much more material question as affecting the interests of the public. See what the defendants could call upon *Ireland* to do under this agreement. They may call upon him to keep his factory always ready, and to have workmen also ready to be put on at any time, though he may have had no employment from them for a long period before. Then, the defendants do not stipulate to give *Ireland* all their work; and it was put proper-

ly at the bar that the words of the proviso would have furnished an answer to an action by *Ireland* against the defendants for not supplying him with work. Another part of the agreement is material; it does not bind *Ireland* merely whilst in trade, but it seems to bind him for life. They have, therefore, the power of compelling *Ireland* to continue the trade in question. He could not say, under the stipulations of this agreement, I am leaving *Birmingham*, or, I am retiring from trade; so that he was obliged all his life to continue his trade in *Birmingham*. Upon these grounds, I am clearly of opinion that this agreement cannot be supported, and I am equally clear that the note cannot be supported. A note is only a promise to pay. It is not payment. After payment, it is true that the account cannot be ripped up; but, unless a note get into the hands of a third person, it is clear that the consideration may be gone into.

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Verdict entered for plaintiffs for 11*l.* 10*s.* 7*d.*

ELKINS, one of the Side Clerks, &c., in the Office of Pleas,
and Another, v. HARDING, Gent., &c.

THIS was an action of *assumpsit* brought by the plaintiffs, one of whom was a side clerk of this Court, and the other, at the commencement of the suit, an attorney of the Court of *King's Bench*, to recover a debt due from the defendant, an attorney of the *King's Bench*, and not an attorney of this Court, for business done for the defendant in the Court of *Exchequer*. At the trial the plaintiffs recovered the sum of 2*l.* 1*s.*

The defendant, when the cause of action arose, and

A clerk in court in the *Exchequer*, suing, with a person not entitled to *Exchequer* privilege, by *capias* of privilege, an attorney of the *King's Bench*, does not lose his privilege.

Where, therefore, a clerk in court, and an attorney of the

King's Bench, sued an attorney of the *King's Bench* by *capias* of privilege, and recovered less than 5*l.*:—*Held*, that it was not a case within the *London Court of Requests* act, 39 & 40 *Geo.* 3, c. 104.

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when the action was commenced, was an inhabitant of and resident in the city of *London*, paying rent, and exercising his business as an attorney-at-law therein. The action was commenced by *capias* of privilege.

On a former day, *R. V. Richards* obtained a rule to shew cause why the defendant should not be at liberty to enter a suggestion on the roll, pursuant to the statute 39 & 40 *Geo. 3*, c. 104. He relied upon the case of *Burn v. Pasmore (a)*, in which it had been decided by *Littledale*,

(a) *BURN v. PASMORE*, *King's Bench*, *Michaelmas Term*, 1830.

THE plaintiff, an attorney of the *King's Bench*, brought an action against the defendant, an attorney of the same Court, by bill, and recovered less than 5*l*. The defendant resided within the city of *London*, upon which ground *R. V. Richards* obtained a rule *nisi* to enter a suggestion upon the roll, in pursuance of the stat. 39 & 40 *Geo. 3*, c. 104; and the question was, whether the statute applied where the plaintiff and the defendant were attorneys.

Coltman shewed cause.—An attorney plaintiff suing an ordinary person by attachment of privilege is not within the statute; but he may waive his privilege if he so please, in which case he would be within the statute. It is true, that the plaintiff does not sue by attachment of privilege in this case, but he does not therefore waive his privilege: he can only proceed by bill against an attorney. He cited *Board v. Parker*, 7 *East*, 47; *Hetherington v. Lowth*, 2 *Str.* 837; *Parker v. Vaughan*, 2 *B. & P.* 29; *Ratcliffe v. Besley*, 2 *Str.* 1141; *Barker v. Palmer*, 6 *T. R.* 524.

R. V. Richards, contra.—It is immaterial whether the plaintiff waives his privilege voluntarily, or is compelled to do so by reason of the character of the defendant; for, in the result, he is equally reduced to the situation of an ordinary plaintiff.

LITTLEDALE, J.—An attorney not suing by attachment of privilege, sues as a common person, and is not entitled to the privileges of an attorney. In this case, the defendant being an attorney, the privilege of the defendant is lost, and he must be considered as suing as a common person. As a private individual he is not entitled to his costs, and therefore the rule must be made

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J., that an attorney of the *King's Bench* suing an attorney of the same Court, lost his privilege, and was within the operation of that statute.

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Chilton shewed cause.—The case of *Burn v. Pasmore* is in direct opposition to that of *Hodding v. Warrant* (a); but it is unnecessary to impeach the authority of that case, because it was decided upon the ground that the defendant, being an attorney of the *same* Court; the plaintiff, though also an attorney, was not, in fact, suing by privilege. That decision, therefore, leaves untouched the cases of *Board v. Parker* (b), and *Johnson v. Bray* (c), by which it was established, that a plaintiff who sues by privilege, is not within the act. Now, the plaintiffs here do sue by privilege, and the question is, could they, under the circumstances, so sue. If the clerk in court had been sole plaintiff, he clearly might sue by *capias* of privilege an attorney of another Court. That was decided in *Walker v. Rushbury* (d), and *Bowyer v. Hoskins* (e), in which it was held, that a clerk in court might even arrest an attorney of the other courts. Then, does a clerk in court, by suing with a person not entitled to the privilege of the *Exchequer*, lose his privilege? A privileged person sued with persons not entitled to privilege, loses his privilege; and it is reasonable that he should do so, because a plaintiff ought not to be harassed by the necessity of proceeding by different modes against the several parties to a joint contract; but there is no authority to extend that doctrine to a privileged plaintiff joined with a common person; and the reason for extinguishing the privilege does not apply to such a case. Whatever may be the rule in other Courts, it is clear, that, in this Court,

(a) 7 East, 46, n.

(d) 9 Price, 17.

(b) 7 East, 46.

(e) 1 Y. & J. 199.

(c) 2 B. & B. 655.

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the privilege is not lost. The ground upon which *Exchequer* privilege stands is, that the king's business may not be impeded through the absence of his officers; and this reason holds equally strong in cases where the officer is a sole plaintiff, or sues with others. Accordingly, we find many entries in *Burton*, in which the privilege of one plaintiff was the ground of the jurisdiction of the Court in respect of both. *Dixon*, clerk of the pipe, and two others, not having privilege, *v. Walker* (a); *Clarke*, secondary, and two others *v. Wolfe* (b); *Haslewood*, *unus numeratorum, et alius quer' in debito sur privilegio de Haslewood tantum* (c); *Edolph, civis London. et Thorp, unus baronum v. Whalley, super privilegium baronis tantum* (d). In *Easter, 13 Jac. 1, (Roll. 211)*, a suit was prosecuted in the Ecclesiastical Court at *York*, against *Beatrice*, daughter and heir of *Robert Browne*, who was married to *Michael Staunton*, one of the clerks in the King's Remembrancer's Office, suggesting that the said *Browne* had made a will, whereby he had given his lands from his daughter. *Staunton* moved the Court for a prohibition; and it was asserted, that a prohibition ought not to be granted in that case, because the suit was only against the wife, and for her inheritance, and he no party to it; which case was often debated in Court by counsel on both sides; and after many precedents shewn, *tam ex parte Remem. regis, quam ex parte clici p'itorum allegantur quod barones clici et ministri hujus cur' ac eorum uxores h'entes conjunctim causam actionis poterint impl'itare, tam in hoc secio quam in camerá Secij, et quod non debent alibi impl'itare nec in p'litum trahi pro terris et catallis suis, et super inde petiit prohibitionem et ei conceditur,*" &c. (e).

(a) 1 Bart. 48.

(b) Ib.

(c) Id. 50.

(d) Ib.

(e) From the most ancient times, the persons employed in the king's service, at his *Exchequer*, were wont to enjoy several

R. V. Richards, contra.—The authority of the case of *Esch. of Pleas, 1831.*
Burn v. Pasmore is not disputed; and it is admitted, that

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privileges. The records of the first period that relate to this subject, are not so clear and full as those of the second period. However, in the former, we find the barons and officers of the *Exchequer* had then divers immunities allowed to them, *per libertatem sedendi ad scaccarium*, in respect of their attendance there. Some of the cases are mentioned in the dialogue *de Scaccario*, L. 1, cap. 8. The records of the subsequent times speak more distinctly. They mention the privilege of impleading and being impleaded in the *Exchequer* only; freedom from toll for things bought for their own use; freedom from suits to county courts, hundred courts, &c.; and other privileges. It is also to be understood, that several of the residents at the *Exchequer*, had privileges not only for themselves, but also for their clerks and their men. Several instances of these things are collected in *Madox Hist. of the Exchequer*, c. 20, s. 7. In the 38th year of King *Henry 3rd*, a writ was sent to the sheriff of *Norfolk*, reciting, that whereas, by the ancient custom and assize of the *Exchequer*, no Baron of the *Exchequer*, or other officer in fee attending there, ought to plead or be impleaded in any other place besides the *Exchequer*; and commanding the sheriff to remove a plea which depended in the county court be-

tween Master *Roger de Gosebec*, who resided at the *Exchequer* for the Marshall of *England*, and *William de Eys*, and others, into the *Exchequer*; and to summon the parties defendants to be there to answer in the premises, (*Trin. Commun. 38 H. 3, Rot. 19, a.*). The same King *Henry 3rd*, in the 39th year of his reign, granted and confirmed to the barons that sat at the *Exchequer*, all the ancient liberties and freedoms which the barons of the *Exchequer* had in the time of his predecessors, kings of *England*, and which the barons, then living, had in his own time, as well in pleas moved and exactions made for their lands, rents, tenements, fees, and possessions; as also in respect of trespasses and injuries done to them and their men; and granted that they should enjoy the said liberties as fully as any barons of the *Exchequer* in times past had enjoyed the same, (*Memor. 39 H. 3, Rot. 7, a.*). The King's treasurer had the privilege of suing and being sued only in the *Exchequer*. As in the case of *Hugh de Patesbule*, (*Memor. 22 H. 3, Rot. 9, b.*); and *Phillipp Lovell*, (*Ex. Memor. 40 H. 3, Rot. 5, a.*); *Alexander*, treasurer of *St. Paul's, London*, baron of the *Exchequer*, (*Trin. Commun. 29 H. 3, Rot. 11, b.*); and *Nicolas de Criott*, baron of the *Exchequer*, (*Hil. Commun. 49 H. 3, Rot. 7, a.*)

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this case would come within the provision of the statute, if the privilege of the clerk in court did not intercept its

had the like privilege. *Robert de Fulham*, constable of the *Exchequer*, sued the priour of *Michellburn*, and another person, in the *Exchequer*, for a debt, (Memor. 38 H. 3, Rot. 8, a.). *John Peverel*, constable of the *Exchequer*, impleaded *Osbert Wynd* and others, for beating and wounding his servant, *Eude Huddock*, (Memor. 51 H. 3, Rot. 7, a.). *Robert de Extons*, was summoned into the *Exchequer*, to answer *William de Medburne*, a chamberlain of the *Exchequer*, for beating, wounding, and evil intreating his men, (Ex. Memor. 28 H. 3, Rot. 2, b.). *Richard de Later* was summoned to appear in the *Exchequer*, to answer *Richard de Oxhay*, a chamberlain of the *Exchequer*, for beating *Simon de Mikelfield*, his man, (Memor. 39 H. 3, Rot. 3, b.). *Roger de le Grene* was summoned into the *Exchequer*, to answer *Baldwin de Lisle*, a chamberlain of the *Exchequer*, for a trespass done to him in his manour belonging to the said chamberlainry, (Ex. Memor. 42 H. 3, Rot. 10, a.); and *Herbert le Mercer* and his man were summoned in like manner, to answer *William Mauduit*, a chamberlain of the *Exchequer*, for a trespass, (Ib. Rot. 11, a.). Two persons were summoned into the *Exchequer*, to answer *Richard de Oxey*, a chamberlain of the *Exchequer*, for breaking his mew, and taking thence a hawk, (Memor. 42 H. 3, Rot. 1, b.).

Stephen de Elcost and others were summoned to appear in the *Exchequer*, to answer to *James*, Earl of *Albermarl*, chamberlain of the *Exchequer*, and *John Samson*, (the Earl's constable of *Skipton Castle*), for an assault and battery, (Pasc. Commun. 52 & 53 H. 3, Rot. 10, a.). *Amicia*, Countess of *Devon*, was summoned to appear there, to answer to *Isabella*, Countess of *Albermarl*, chamberlainess of the *Exchequer*, for the issues of certain lands, (Ib. Rot. 11, a.); afterwards, the King having commanded the barons to transfer into the *Common Bench* all plaints depending before them between *Amicia*, Countess of *Devon*, and *Isabella*, Countess of *Albermarl*; but in regard the said *Isabella* was, by her attorney, constantly attending on the King's service in the office of chamberlain of the *Exchequer*, the King commands the Barons to adjudge in the *Exchequer* upon all plaints wherein she was concerned, as according to right and usage they ought to do, (Hil. Commun. 56 H. 3, Rot. 5, a.). *John de Matham*, a person employed in the Chamberlain's office, sued *William le Suneter* and another, in the *Exchequer*, for driving away and ill-treating his cattell, (Pasc. Commun. 18 H. 3, Rot. 6, a.). *Taylefer*, the usher, sued *Walter Wam* in the *Exchequer*, for not mowing his meadow, and gathering in the hay in due time, whereby the hay was all

operation. The only question, therefore, is, whether the clerk in court can, by suing by *capias* of privilege, oust

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spoiled; to his damage, half a mark: *Walter* came and pleaded, that he duly mowed the said meadow and got in the hay, and that the hay was not spoiled by his neglect, but by a flood, which carried away great part of it; upon this, an issue was joined to be tried by the neighbourhood; and an *avenire facias* was awarded to the Sheriff of *Surry's* clerk, to summon four of the neighbours to try the issue (at the *Eschequer*) on the morrow of the *Ascension* (Pasc. Commun. 49 H. 3, Rot. 11, a.). *Thomas Malbraunch* and others were summoned into the *Eschequer*, to answer to the King for assaulting and beating the King's messenger, who carried the King's summons (Ex. Memor. 42 H. 3, Rot. 15, b.). Two persons were summoned into the *Eschequer*, to answer for a trespass in beating *Hugh de la Grave* a servant of the treasurer (Ex. Memor. 26 H. 3, Rot. 2, b.): and it seems the treasurer had the fine which was incurred by that trespass (Ib. Rot. 6, a.): *John de E.* and others were summoned into the *Eschequer*, to answer for a trespass in beating and imprisoning the treasurer's men (Ex. Memor. 28 H. 3, Rot. 1, a.). *Ralf de Bosco* and others were summoned into the *Eschequer*, to answer to the Abbot of *Westminster*, a Baron of the *Eschequer*, for beating and wounding his men (Trin. Commun. 29 H. 3, Rot. 12, b.). *Richard de Curton*, valet of *Phi-*

lipp Lovell, the King's treasurer, sued *Henry*, son of *Fulcher*, for taking and detaining his cattel, (Memor. 39 H. 3, Rot. 8, a.). *William de Wilton* and others were summoned into the *Eschequer*, to answer *Peter de Horepol*, valet of *W. Mareschall*, a Baron of the *Eschequer*, in a plea of debt (Hil. Commun. 49 H. 3, Rot. 7, a.). *John de Butiler*, valet to the treasurer, sued *Walter le Fuller*, for wounding *William Herbert*, the said *John's* man, and taking away some of *John's* goods from the said *William* (Ex. Memor. 52 H. 3, Rot. 11, a.). Master *Everard*, clerk to *P. de Rivallo*, Baron of the *Eschequer*, sued *John Sewall* there, for a debt of ten marks (Ex. Memor. 52 H. 3, Rot. 11, a.). The abbot of *Westminster*, a Baron of the *Eschequer*, sued *Geoffrey le Despenser* and others, in the *Eschequer*, for beating *G. de Prilla*, his man (Ex. Memor. 35 H. 3, Rot. 7, a.). *Herbert*, parson of *Hadley*, a clerk of the *Eschequer*, sued *Richard de Ewell* there, for a debt, (Memor. 40 H. 3, Rot. 17, a.) *Richard de Hereford*, a clerk of the *Eschequer*, sued *Thomas le D.* and others, in the *Eschequer*, for beating *Maurice de Tierney*, *Richard's* man (Ex. Memor. 35 H. 3, Rot. 14, a.). *Richard Chamberlain*, a clerk of the *Eschequer*, sued *Robert Goldhose*, in the *Eschequer*, for beating *Robert Williamson*, the said *Richard's* man (Memor. 35 H. 3, Rot. 1, a.). *Hugh de Cla-*

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the privilege of the defendant. It must be admitted that a privileged officer of this Court may sue and arrest an

hall, valet of E. de Westminster, clerk of the Exchequer, brought his action in the Exchequer, against certain persons, for taking and carrying away his fish (Ex. Memor. 42 H. 3, Rot. 1, a.). John de Ely, a servant in the Exchequer, brought his suit there, against one for taking and detaining his swans (Memor. 42 H. 3, Rot. 10, b.). Richard de Chesterford, a clerk of the receipts, sued Nicolas Poyuz and another, in the Exchequer, for debt (Memor. 52 H. 3, Rot. 9, b.). A plea was also moved in the Exchequer, between the said Richard de Chesterford, and Bonersfaunt, a Jew, for contumelious words spoken by the Jew against Richard—The process and judgment in that plea may be seen in Prynne (Ex. Memor. 51 H. 3, Rot. 4, a. Vid. 4 Prynne, in 4 Inst. p. 59). Robert Dean, of Guildford, was attached to answer Hugh de Oldebush, a clerk of the Exchequer, for a trespass—Hugh and others, the King's bailiffs, who, by the King's command or writ, had arrested Robert, were prosecuted for it, in the Ecclesiastical Court, before John de Burton, official to the bishop of Worcester: the official was commanded, by a writ of prohibition, not to proceed to execute a sentence which he had pronounced for the said cause against Hugh and the bailiff; notwithstanding the official did again denounce them excommunicated: thereupon the official was summoned to

appear at the Exchequer to answer why he had acted in that manner, in contempt of the King, and in elusion of the liberties belonging to the residents of the Exchequer, (Memor. 1 E. 1, Rot. 8, b.). Add hereto, that the King's chaplain, (Memor. 51 H. 3, Rot. 5, b.); his mason, (Memor. 40 H. 3, Rot. 17 a.); and others that were in his service, had, as it seemeth, the privilege of being sued in the Exchequer.

Again, the residents of the Exchequer were, by the ancient custom of the Exchequer, to be quit of toll for things bought to their own use (Memor. 39 H. 3, Rot. 14 b.). *Ralf de Leicestre*, a clerk of the Exchequer, was exempted from paying toll for goods bought by his servants for his use in *Eton fair*, (Memor. 28 H. 3, Rot. 10 b.; *et ibid.* Rot. 12 a.). King Edward the first remitted to *Roger de Northwood* and *John de Cobeham*, barons of the Exchequer, the services due to the King in the army of *Wales* for lands which they held of the King in chief, viz. the king remitted it *hâc vice* of his special grace in respect of their attendance at the Exchequer, (Pasc. Commun. 5 E. 1, Rot. 5 a.).

Moreover, the residents of the Exchequer were privileged to be free from suit to county courts, hundred courts, &c., and from the common amerciaments of the counties or hundreds wherein their lands lay. In the reign of king

attorney of another Court by *capias* of privilege, but there is no reason why that rule should be extended to

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Richard the first, *William Mareschall* and *Geoffry Fitz-Pierre* were, by reason of their session at the *Exchequer*, exempted from the common amerciamen of the county for a murder, (Mag. Rot. 2 R. 1, Rot. 11 b.). The like privilege or exemption was allowed to *Roger Fitz-Renfrey*, (Mag. Rot. 5 R. 1, Rot. 4 b.); to *Geoffrey Fitz-Pierre* again (Mag. Rot. 5 R. 1, Rot. 1 a.); to *Warrin Fitz Gerold*, (Mag. Rot. 7 R. 1, Rot. 6 b.); the Bishop of *London*, (Mag. Rot. 7 R. 1, Rot. 18 b.); the Bishop of *Ely*, (Mag. Rot. 7 R. 1, Rot. 6 b.); the Bishop of *Norwich*, and *Earl Roger*, (Ib. Rot. 6 b.); *Earl Roger* was at this time one of the King's justiciars, (Mag. Rot. 7 R. 1, Rot. 6 a.), and an assessor or baron of the *Exchequer*; to the Bishop of *London*, (Mag. Rot. 10 R. 1, Rot. 12 a.); to *Alexander de Luci*, and to others. In the reign of king *Henry* the third, privilege or exemption of one or other of the kinds aforementioned was allowed to the persons hereunder named, (Mag. Rot. 4 Joh. Rot. 18 b.), viz. to *John de Windlefore*, (Memor. 6 H. 3, Rot. 2 b.); and *Thomas de Windlefore*, (Ex. Memor. 25 Hen. 3, Rot. 2 a.) who were *ponderatores* of the *Exchequer*; to the knights and freeholders of *Falk de Breaute* belonging to the fee which he held by the service of the chamberlainry of the *Exchequer*, (Memor. 6 H. 3, Rot. 3 a.); to *Matthew de Eston*, tenant to *Margaret de Ripariis*,

of the fee which she held by the service of the king's chamberlainry, (Ex. Pasch. Memor. 11 H. 2, Rot. 3 b.); to *Richard de Oxehry*, chamberlain of the *Exchequer*, (Memor. 39 H. 3, Rot. 6 a.); to the menial men of *Baldwin de Lisle*, chamberlain of the *Exchequer*, (Trin. Commun. 41 H. 3, Rot. 16 b.); to *Roger*, usher of the *Exchequer*, (Memor. 14 H. 3, Rot. 10 b.); to *Robert de Fulham*, constable of the *Exchequer*, touching suit before Justices itinerant upon the common summons and suit to the hundred of *Birdestaple*, (Memor. 39 H. 3, Rot. 3 a.); to *William de Stebbinges*, a minister, resident in the *Exchequer*, (Memor. 40 H. 3, Rot. 20 b.); to *Ralf Sumer*, a minister of the *Exchequer*, (Trin. Commun. 41 H. 3, Rot. 16 b.); to *Richard Alswick*, one of the keepers of the king's palace at *Westminster*, who was attending on the barons, (Memor. 41 H. 3, Rot. 14 a.); and to *Adam de Stratton*, a clerk of the *Exchequer*, (Memor. 1 & 2 E. 1, Rot. 5 a.). There was also a sort of privilege allowed to persons who were suitors or accomptants at the *Exchequer*, namely, if they were to appear in any inferior court or place upon a certain day, in case they were that day attending at the *Exchequer*, they were not to be put in default below. This privilege was allowed to *John*, son of *Osbert*, citizen of *Lincoln*, (Me-

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other persons, or that it should apply to attornies of this Court, not officers of the Crown.

LORD LYNTHURST, L. C. B.—A clerk in court is an officer entitled to this privilege, and the cases cited establish that he does not lose his privilege by suing with a person not entitled to the same privilege. It does not follow from this decision, that attornies admitted in this Court would be entitled to the same privilege: that question does not arise upon this rule.

Rule discharged (a).

mor. 6 H. 3, Rot. 5 b.). See *Madox Hist. Exch. c. 20, s. 7; and as to the privilege of accountants, see 1 Burton, 55, et seq.*

(a) It is observable, that the privilege of the ministers and officers of the Court of *Exchequer* is founded upon the immemorial course of the *Exchequer*, which is the law of that Court. Upon this ground, the cases of *Walker v. Rushbury*, 9 Price, 16, and *Bowyer v. Hoskins*, 1 Y. & J. 199, were expressly

decided; and, as the same reason does not exist for extending the like privilege to attornies admitted to practise in that Court under the stat. 1 Wm. 4, c. 70, s. 10, it would seem that attornies so admitted would not be entitled to the like privileges, but to such only as they would be entitled to for the benefit of their clients, which is the ground of the privilege of attornies in the other Courts.

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Where a *venire de novo* is awarded, the Court has no power over the costs of the application.

Debt on bond, with breaches assigned under the statute 8 & 9 Wm. 3, c. 11, s. 8. The cause was twice tried (a). At the first trial, the jury found a verdict for the plaintiff, but no damages were assessed; upon which ground a *venire de novo* was awarded, the costs of the application being reserved until after the second trial. Upon the second trial, the Jury again found a verdict for the plaintiff; and now *John Evans* moved for the costs of the former application for a *venire de novo*.

(a) 3 Y. & J. 423; *ante*, p. 307.

Russell, Serjt., and *E. V. Williams*, opposed the application. There are two objections to this application; *first*, it would have been error had no damages been assessed; and the default originating with the plaintiff, the defendants ought not to pay the costs incident to that default; and, *secondly*, where a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial; *Lickbarrow v. Mason* (a), *Bird v. Appleton* (b); and, therefore, the Court has no power over the costs of the application, which are merely ancillary to the costs of the trial.

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BAYLEY, B.—The Court has no discretion upon the subject. It would have been error if the plaintiff had not assessed his damages (c); and he was, therefore, under the necessity of going down again to remedy the default. The expense of the first trial was thrown away; and I do not know what authority the plaintiff has to say, that the defendant shall bear the expense incident to the first trial.

VAUGHAN, B.—If we could exercise a discretion, I should feel no difficulty; but, upon consideration, although the question of costs was reserved, I think that we have no authority upon the subject.

BOLLAND, B.—There is a great difference between a new trial and the award of a *venire de novo*. In the former, which is an application to the discretion of the Court, terms may be imposed; but, in the latter, the party succeeding is not entitled to the costs of the first trial. We have, therefore, no power to entertain this application.

Rule refused.

(a) 6 T. R. 181. (b) 1 East, 111. (c) 1 Wms. Saund. 58, n. (1).

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The ATTORNEY-GENERAL v. DIMOND.

Probate duty is not payable in respect of property in a foreign country belonging to a testator dying in this country, although the property be brought into and administered in this country by the executor.

THIS was an information for probate duty. At the trial, before *Vaughan*, B., at the sittings after last *Trinity* Term, a verdict was found for the Crown, subject to the opinion of the Court upon a special case, which stated that *Paul Francis Benfield*, of *West cottage*, in the parish of Saint *Mary*, in or near *Leicester*, in the county of *Leicester*, on the 21st day of *April*, 1827, duly made his last will and testament, by which he appointed the said defendant *Charles Palmer Dimond*, and *Henry Dalby*, since deceased, his executors and residuary legatees, in trust to pay the interest of the residue to Mrs. *Benfield*, the testator's mother for her life, and after her decease to pay the principal to the children of his two sisters, on attaining the age of twenty-one years; the said testator also made two codicils to his said will, one dated the eighth day of *May*, 1828, and the other the ninth day of *May*, 1828.

The said testator died at *Leicester* on or about the 10th day of *May*, in the year of our Lord, 1828, and on the 28th day of *June*, 1828, the will and codicils were proved in the Prerogative Court of *Canterbury* by the said *Charles Palmer Dimond* alone. The personal property of the said testator was sworn to be under the value of 5,000*l.*, and a probate duty of 80*l.* only was paid. The testator, at the time of his death, was a creditor of the *French* government, to the amount of the annual sum of 32,727 francs, 5 *per cent.* consolidated inscribed in the great book of the debt public of *France*, called *rentes*. The personal property of the said testator, not including the said *rentes*, was under the value of 5,000*l.* After the death of the said testator, and on or about the 8th day of *July*, 1828, the said *Charles Palmer Dimond*, who had survived the said *Henry Dalby*, executed a power of attorney authorizing Messrs. *Mallet*, a *French* house, to sell

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out the *rentes* in question. This power of attorney, together with a notarial exemplified extract of the clause in the will appointing the executors, and a notarial copy of the probate act, and a notarial certificate of the burial of *Paul Francis Benfield*, the testator, were produced by Messrs. *Mallet* to the Bank of *France*, and the said *rentes* were thereupon sold by them at *Paris*, under the said power of attorney, and the produce was received by them and transmitted by bills amounting to 27,183*l.* 9*s.* 2*d.* sterling, on account of the said *Charles Palmer Dimond*, to Messrs. *Hammersley & Co.*, bankers, of *London*, and was placed by them to the account of the said *Charles Palmer Dimond*, as such executor; and the said Messrs. *Hammersley*, by order of the said *Charles Palmer Dimond*, as such executor, invested the produce of the said bills in Bank three *per cent.* annuities in the *English* funds, in the names of himself and a co-trustee appointed by him, in the room of the said *Henry Dalby*, where the same still continues. The testator was at his death, and during his life-time, an *English* subject, and resident in *England*, and the said *Charles Palmer Dimond* has always been the same.

The question for the opinion of the Court was, whether the said *Charles Palmer Dimond* was bound to pay a probate duty on the amount of the produce of the said *French rentes*, over and beyond the sum of 80*l.*, the probate duty paid on the estate of the said testator, as being of the value of 4,000*l.*, and under the value of 5,000*l.*

Follett, for the Crown.—The question is, whether personal property of a testator which, at the time of his death, is in a foreign country, but which after his death is brought into this country by his executor acting under a probate granted in this country, and is administered in this country as part of the assets of the testator, is or is not liable to probate duty. It is not necessary in this case to dis-

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cuss, whether property remaining abroad and not brought into this country, is or is not subject to probate duty; for here the executor has got possession of this property under the probate granted in this country, and has the produce of the *rentes* converted into *English* money in his hands, to be administered in this country under the probate granted here. The statute (a) which imposes the probate duty, makes it payable upon "the estate and effects for or in respect of which such probate, letters of administration, &c., respectively shall be granted &c.," and this applies to all the personal estate taken possession of by the executor under the probate.

In a late case (b), the probate duty was considered to apply to such property only as was recovered by virtue of the probate or letters of administration. In that case, the late Lord Chief Baron observed: "By the act of Parliament the duty upon the probate is only imposed in respect of that fund which the executor is to obtain in a particular province of this country by force of that probate: if there be a personal estate in the provinces of *York* and *Canterbury*, and a probate be taken in the province of *York*, the duty is paid upon the property in that province only, and it is not paid upon the other property, until a probate be taken in the province of *Canterbury*. This is made apparent by the very terms of the act, evidently confining the charge upon the probate to those particular estates to be recovered by force of that administration." Here, however, the executor having possession of and having administered this property under the probate, it must be part of the estate and effects in respect of which the probate was granted.

It is a clear rule of the law of this and every other civilized country, that personal property is considered as

(a) 55 Geo. 3, c. 184.

(b) *In re Ewin*, ante, 145.

having no locality; but, in whatever country the owner is domiciled at the time of his death, by the law of that country must the distribution of his personal property, wheresoever situate, be regulated. It will be said, however, that although the law of this country does not recognize the locality of property for the purposes of distribution, yet, as regards the probate, the *situs* of the property is to be considered. To a certain extent this is true; for, in granting probate or letters of administration in the spiritual Courts in this country, the *situs* of the property regulates the jurisdiction. This originated in the right which the ordinary formerly had to take possession of the goods of a person dying intestate within his jurisdiction. In this respect, the right of the ordinary was confined to the limits of his jurisdiction, and if goods of an intestate were in different dioceses, and within the jurisdiction of different ordinaries, each ordinary would take possession of such goods only as were within his own diocese. Afterwards, when the ordinaries came to grant probate and letters of administration to the persons entitled to the possession of the personal estate of deceased persons, the same rule with respect to locality was adopted. To this extent only the law of this country has recognized the locality of personal property; but the question remains, what property does the probate, or do the letters of administration, when granted, vest in the executor or administrator. It is clear that they vest all the property within the jurisdiction of the ordinary at the time when the probate or administration is granted. It is equally clear that they vest not only all the property within such jurisdiction at the time of the grant, but likewise all the property of the intestate or testator which at any time comes into such jurisdiction. If this be so, the property in question would vest in the executor under this probate, although not within the province at the time of

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granting the probate. Suppose that a party were to die in *London*, leaving personal property to a certain amount there, and that letters of administration or probate had been granted, so as to vest such property in the administrator or executor; suppose, after such grant, a ship to arrive from sea with merchandize of the deceased on board; can it be doubted that such merchandize would belong to the personal representatives of the deceased? Looking at such a case, without reference to the stamp or probate duty, it is quite clear that the representative might sue for and take possession of such property. Since the passing of the act imposing the duty, no Court of law would permit the representative of the deceased in the case put, to recover this property in trover upon a probate on which a stamp had only been impressed with reference to the property in *London*. To maintain such an action, the duty must have been paid on the whole property so sought to be recovered. In such case the party may, and is required by a provision of the act to increase the stamp by paying the additional duty.

[*Bayley, B.*—In the case put, the property has no locality. It is not the case of property locally situate in another country].

[*Lord Lyndhurst, L. C. B.*—Suppose a simple contract debtor to reside in *Ireland*, in which case probate must be taken out in that country, and, after the death of the creditor, the debtor to come into *England*, and probate to be taken out there in respect of property in *England*, could the debt be recovered in *England* under the latter probate?]

The criterion would be, whether the executor obtained possession of the property under the probate in this country. If he obtained possession under the probate granted in another country, he would not be bound to pay duty here.

[*Bayley, B.*—There is a case (a) somewhat analogous to the case put by Lord *Lyndhurst*. A party died in *England*, leaving *bona notabilia* in *England* and *Ireland*. Probate was taken out in *Ireland* by the son, and in *England* by the widow. Amongst the *bona notabilia* was a bond, upon which the *English* administrator brought an action, and which the *Irish* administrator had released. The defendant in the action pleaded the release by the *Irish* administrator, and the issue ultimately taken in the case was, whether the bond, at the time of the death, was in *London* or in *Dublin*; but there was a mistake in the pleadings].

When property is in *Ireland*, a probate must be taken there, and that property is obtained under that probate. Here, however, it is clear, from the facts stated, that the defendant obtained possession of the property in question under the probate granted in this country, and that the bank of *France* acted on the faith of that document.

[*Bayley, B.*—They also took the power of attorney, and a notarial copy of the clause in the will, by which the party was appointed: whether the property was obtained under the one or the other, we cannot tell].

The parties must have acted upon the probate. Two executors are appointed by the will, and the notarial copy of the clause of the will would have shewn that there were two parties; but the notarial exemplification of the probate would shew that it was granted to one only, and that one only executed the power of attorney; and under the power of attorney executed by that one executor only, the bank of *France* proceeded to sell out the stock; so that they must have acted on the faith of the probate.

[*Bayley, B.*—They would be regulated by the law of

(a) *Daniel v. Luker*, Dyer, 305 a; 1 Roll. Ab. 908; Com. Dig. Administrator, (B. 3).

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England, by which, though there are two executors, one may sell; and, therefore, the suffering a sale by one does not shew that they were acting upon the authority of the probate].

If, instead of receiving the proceeds of the property himself, they had been received tortiously by a third person against the consent of the executor, and brought into this country, could the executor have recovered against such third party without increasing the duty upon the probate? In such case, the executor would be entitled to recover the property only by virtue of the probate, and must have clothed himself with an adequate authority to recover the property by increasing the duty. Again, if the executor had been sued, there can be no doubt but that this property, upon a plea of *plene administravit*, would have been assets in his hands. He, therefore, takes it in his character of executor, and is liable in respect of it in that character.

In the case of *Logan v. Fairlie (a)*, before the present Master of the Rolls, the party died in *India*; and one of the arguments urged at the bar was, that the administration ought to have been taken out in this country; and the Master of the Rolls says: "It must be observed, that this suit has proceeded irregularly. This Court cannot administer any personal estate without having the personal representative before it; and this suit is defective throughout, for want of such personal representative, though the objection comes now too late to be corrected." Now, in that case, the party appointed the personal representative was before the Court, but no probate had been taken out, and therefore he was not regularly before the Court.

The proper criterion in the present case seems, upon the whole, to be, whether the defendant received in *England*

(a) 2 Simon & Stuart, 284.

this property in his character of executor, as assets to be administered by him in this country. If so, it is clearly part of the estate and effects of the deceased, and liable to the probate as well as to the legacy duty.

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Merewether, Serjt., for the defendant.—This property was not liable to the probate duty. It is necessary, in the outset, to distinguish the probate from the legacy duty. It has been already decided (a), that legacy duty would be payable; and, in the course of that decision, a distinction was expressly taken between the legacy and the probate duty. The Lord Chief Baron said, in that case—"Upon what grounds is it contended, that this estate is not liable? Because the duties on probates and administrations would not have extended to this particular fund. This argument does not appear to me to make any difference in this case. By the act of Parliament, the duty upon the probate is only imposed in respect of that fund which the executor is to obtain in a particular province in this country by force of that probate. If there be a personal estate in the province of *York* and *Canterbury*, and a probate be taken in the province of *York*, the duty is paid upon the property in that province only, and it is not paid upon the other property until a probate be taken in the province of *Canterbury*." Mr. Baron *Bayley* also proceeded on the same ground: after having disposed of the cases of *Bruce v. Bruce*, and *Somerville v. Somerville*, he says, "Now the probate duty is only with reference to the *situs* of the property, within the limit of the probate. In the course of the argument, the case was put of a *York* administration, and a *Canterbury* administration; the duty with reference to those will be regulated by the amount of property in each of those dioceses; but, if there is other property not in those dioceses, but property abroad with re-

(a) *Ex parte Ewin*, ante, 153.

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ference to which there may be no probate essential, or with respect to which the only probate will be the probate belonging to that country, that will not be taken into the amount of duty paid either upon the *Canterbury* administration, or the *York* administration." The *dicta* in that case, though only *obiter dicta*, are supported by the law and by authority. It has been contended on the other side, that this property would be assets in the hands of the executor. That, however, is not the question here. The real question is, whether there is any statute which imposes the probate duty upon this property. The words of the 38th section, which is the material section of the act of the 55 Geo. 3, c. 184, which imposes the duty in question, are, "that no Ecclesiastical Court or person shall grant probate of the will, or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, &c., that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, &c., in order that the proper and full stamp duty may be paid, &c." And reference is made to the third part of the schedule, where the same words are used as denoting the property *in respect of which the duty is to be paid*; not the property to be administered; not the assets; but that in respect of which the administration is granted. It is agreed, that, with respect to the distribution of personal property, the *situs* is not the matter to be looked to. That was decided in *Somerville v. Somerville* (a) and *Bruce v. Bruce* (b). It is also conceded,

(a) 5 Ves. 750.

(b) 2 Bos. & Pull. 229, n.

that, as far as relates to the granting of the probate, the jurisdiction is regulated by the locality of the property. If there should be property in this country existing in two provinces, there must be separate probates granted in each of them; and it is clear that it is the *situs* of the property which gives the jurisdiction to the ordinary. Sir *Wm. Blackstone* (a) has taken great pains in sifting the authorities upon this subject, and has given the result of them. He says: "If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones; but if the deceased had *bona notabilia* or chattels to the value of 100*s.* in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the Metropolitan of the province, by way of special prerogative." "Which prerogative (properly understood), is grounded upon this reasonable foundation, that, as the bishops were themselves originally the administrators to all intestates in their own dioceses, and as the present administrators are, in effect, no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority extends not." The Legislature has drawn a distinction in the language used with respect to the duty upon probates and legacies. As to probates, the duty is to be paid upon the estate and effects for or in respect of which the probate or letters of administration are granted; but, with respect to legacies, it refers to the payment and discharge. The legacy duty is therefore payable for every legacy, specific or pecuniary, charged upon personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged; and the same distinction was taken in the case of

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(a) 2 Bl. Com. 508, 509.

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Erwin (a), before this Court. The Court there expressly said, that the legatee should pay the legacy duty, because the legacy was paid to him in this country. The distribution and payment is that upon which the legacy duty attaches; but the locality of the property at the time of the death of the party regulates its liability to the payment of the probate duty.

The next consideration is, whether there is any foundation for the argument used on the other side, that the locality may shift after the death of the party, or whether it is to be determined at the time of the death of the testator. The form of the probate is the best test of the property in respect to which it is granted. It runs thus:—“the deceased having while living, and at the time of his death, goods, &c., in divers jurisdictions, by reason whereof the proving &c. and administration of the said goods, and also the auditing, allowing, and final discharging the amount *thereof*, appertain to us, and not to any inferior judge.”

The power given in certain cases to alter and increase the probate, does not affect this question; it relates only to cases where a portion of the property would be beyond the pecuniary limits of the administration, and not known at the time; and in order to cover the mistake in the oath, power is given to alter it; but there is nothing to meet the present case, or to shew that the probate duty is to be increased where property is subsequently brought within the local scope of the probate. By the 32nd clause of the act imposing the probate duty, a party not proving is liable to most severe penalties; and supposing these *rentes* had been the only property of which the testator died possessed, is the executor to be liable to the penalty because he had not proved in respect of them? It would surely be going a great way, if the Court were to hold that he is to obtain probate, subject to a penalty for

all property in respect of which the probate is not granted. It is impossible that he would be liable to the penalty; and, if he is not so liable, this cannot be property in respect of which the probate is granted. The 92nd canon (a) ordains, that all chancellors, or officials, or any other exercising ecclesiastical jurisdiction whatsoever; shall, at the first, charge with an oath, all persons called, or voluntarily appearing before them for the probate of any will, or the administration of any goods, whether they know or firmly believe that the party deceased had, at the time of his death, any goods or good debts in any other diocese or dioceses, or peculiar jurisdictions within that province, than that wherein the said party died. This establishes the difference between the jurisdictions, and that it is to be defined by the property that the deceased had, at the time of his death, within the jurisdiction. The 93rd canon (b) directs, "That no Judge of the Archbishop's Prerogative shall henceforward cite, or cause to be cited, *ex officio*, any person whatsoever, to any of the aforesaid intents, unless he have knowledge that the party deceased was, at the time of his death, possessed of goods and chattels in some other diocese or dioceses, or peculiar jurisdiction within that province." Therefore, it seems to be quite clear, that the power and jurisdiction of the Ecclesiastical Courts is limited by the local position of the property at the time of the testator's or intestate's death; and that it cannot apply to property brought into the jurisdiction after the death of the testator.

The argument on the other side assumes, that this property, which was brought into *England*, had been obtain-

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(a) 4 Burn's Eccl. L. 235.

(b) 4 Burn's Eccl. L. 236. These canons, with others, were made by the clergy in a convocation. 1 Jac. I. 1603. They received the royal

assent, but were not confirmed by Parliament, and therefore do not *proprio vigore* bind the laity. See Str. 1056; 2 Atk. 650.

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ed in *France*, under the probate; but the fact is directly the reverse. It was not obtained under the probate, but by virtue of the will. The party was dead, and the property was to go to his successor. Such succession is to be ascertained by the disposition of the party who has died, that is, by his will; and a sufficient title is given by the law of all countries under the will. The fact, that the government in *France*, under whose authority it was paid over, were not satisfied with the act of the Ecclesiastical Court, is clear, from their requiring proof of the death of the intestate, which, if they had relied upon the decision of our Ecclesiastical Court, would have been unnecessary. In *Tourton v. Flower (a)*, Lord Chancellor *Talbot* said, "That although the letters of administration had been obtained in *France*, the Court could take no notice of what was done in a Spiritual Court beyond sea, upon that subject." So, in *France*, they would not take notice of the decision of our Courts, but they would take notice of an act done by the party whose property these *rentes* were. In a Court of Law in this country, they would not take notice of a *French* probate, and it may, therefore, be assumed, that the *English* probate would not be acted upon in *France*. And, in *Jauncey v. Sealey (b)*, it was decided, that where all the property of a person dying abroad was in a foreign country, the will need not be proved here.

Follett, in reply.—The cases cited for the defendant establish, that the Courts of this country do not recognise the acts of foreign Spiritual Courts, and therefore shew, that an executor, seeking to recover, in this country, property locally situate abroad, at the time of his testator's death, must take out probate in this country for that

(a) 3 P. Wms. 371.

(b) 1 Ver. 397.

purpose; and he must, therefore, clearly be liable to the payment of probate duty on such property.

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LORD LYNDEHURST.—This case arises out of the statute 55 Geo. 3, c. 184, by which a stamp duty is imposed upon the probate of wills. By the terms of the act the amount of the duty is regulated by the *value of the estate and effects for or in respect of which the probate is granted*; and the question therefore is, for or in respect of what estate and effects was the probate granted in the present instance. Formerly, in cases of intestacy, the ordinary, or spiritual judge had a right to administer. “The probate of wills (as *Blackstone* (a) observes) followed of course, for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate whose right of distributing his chattels for the good of his soul was superseded thereby.” But when probate was passed (that is, when the ordinary has declared that he is satisfied as to the will), the executor derives his power not from the probate, but from the will. *Ashurst, J.* (b), says expressly, “The executor has a right, immediately upon the death of the testator; probate is a mere ceremony, but, when passed, the executor does not derive his title under the probate, but under the will. Probate is only evidence of his right.” So, *Plowden*, 280, probate is but a confirmation and allowance of what the testator has done. The jurisdiction to grant probate is regulated by the place of the testator’s death, and the local situation of his effects at the time of his death. If, for example, he die in one diocese, and have *bona notabilia*, that is, goods to the value of 5*l.*, at the time of his death, in another diocese of the same province, the jurisdiction belongs to the metropolitan. If he have also, at the time of his death, effects to the above amount in more than one diocese of the other pro-

(a) 2 Com. 494.

(b) *Smith v. Milles*, 1 T. R. 480.

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vince, the archbishops shall, in each province, grant a probate according to the *bona notabilia*, within their respective jurisdictions (a). The probate is granted in respect of the effects which are within the jurisdiction of the spiritual judge at the death of the testator. The jurisdiction is exercised in respect of these effects only. If the executor thinks fit, he may remove the goods from one jurisdiction to another, he may shift them from jurisdiction to jurisdiction. But this does not affect the right of granting probate, which is regulated by the local situation of the effects at the testator's death (b). If they are removed into another jurisdiction, it is not necessary to obtain any sanction or authority from such jurisdiction.

But it is said, that the property, in this case, was part of the assets of the testator, and was received as such by the executor; undoubtedly these rents did form a part of the testator's assets. The effects of the testator are assets wherever situated, whether at home or abroad; and such effects as are in a foreign country at the time of the testator's death, although they remain and are wholly administered there by the executor, are equally assets. But probate is not granted in respect of the assets generally, but in respect of such part of them as are, at the testator's death, within the jurisdiction of the spiritual judge by whom it is granted.

It was also urged, that the property, in this case, was obtained by means of the probate, and was, therefore, liable to the duty. It is true, that a notarial copy of the probate, and a notarial certificate of the burial of the testator, and a notarial copy or extract of the will, shewing the appointment of the defendant as executor, were produced at the

(a) But if there are *bona notabilia* in different dioceses of one province, and in one diocese only of the other, in respect to the former the archbishop shall have the probate, in respect to the latter the

particular bishop. Off. Ex. 48.

(b) The property in this case was *bonum notabile* in France, out of the jurisdiction of the spiritual Courts of this country.

bank of *France*; upon which the bank, without the intervention, as it seems, of any tribunal, allowed the *rentes* to be sold: they appear to have been satisfied by those documents that the defendant was executor, and entitled to the property, and they acted accordingly. Whether they would have been satisfied by any other evidence, and without the production of the copy of the probate, we have no means of determining. But, admitting that the production of the notarial copy of the probate was necessary to satisfy the bank of the title of the executor, still that circumstance does not appear to us to affect the question, which is, whether the *probate was granted for or in respect of this property*. It could not be granted for or in respect of it, because the property was, at the death of the testator, in a foreign country, and consequently out of the jurisdiction of the spiritual judge. In the case of *Logan v. Fairlie*, which was cited, funds were remitted from *India to England* after the testator's death. The learned Judge, upon the facts before him, considered that portion of the funds as administered here, and that a legacy duty was therefore payable. But it is not the administration of assets that renders the probate duty payable, but the local situation of the assets at the testator's death. We think, therefore, the verdict should be entered for the defendant.

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Verdict for the defendant.

AFTER the judgment, *Follett* applied, on behalf of the *Attorney-General*, to turn the case into a special verdict, insisting that the *Attorney-General*, by virtue of his office, might demand it.

Merewether resisted the application.

BAYLEY, B.—I know not by what authority we can convert a statement of facts into a finding upon oath, except by the consent of the parties.

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Lord LYNTHURST, L. C. B.—If the prerogative exists, it may be exercised by the officers of the Crown, without the assistance of the Court. The Court will not interfere (a).

(a) The case stood over until the sittings after Term, to enable the Crown officers to consider this question. In the result, the judgment of the Court was acquiesced in, the *Attorney-General* being of opinion, as the reporters are informed, that, if the prerogative existed, it ought not to be enforced.

It seems difficult to answer the observation of Mr. B. Bayley; and yet, even in modern times, this prerogative has been acted upon. In *The Attorney-General v. Bacchus*, 9 Price, 30, the Court gave judgment for the defendants; whereupon *Shepherd*, for the Crown, moved to turn the case into a spe-

cial verdict, which, as the defendant would not consent, the Court refused; but afterwards, Sir *Robert Gifford* demanded it as a matter of right by virtue of his office, and the Court conceded the point. The following rule was drawn up:—*Hilary Term*, 1 Geo. 4, 12th February, 1820. Upon the motion of Sir *Robert Gifford*, Knt., his Majesty's *Attorney-General*, on behalf of his Majesty, praying that the case made in this cause for the opinion of the Court may be turned into a special verdict for the judgment of the Court, it is by the Court hereby ordered as prayed.

Exch. of Pleas.

EVANS v. DUNCOMBE.

Semble—That an attorney, not of this Court, practising in this Court through a clerk in court, is subject to the summary jurisdiction of this Court.

Semble—That the Court will compel an attorney to perform an undertaking entered into by him, notwithstanding it is void by the statute of frauds, and no action can be brought upon it.

NOTICE of trial having been given in this case, Mr. *Green*, who acted throughout the cause as the attorney for the defendant through a clerk in court, gave the following undertaking: "I, the undersigned, agree to pay the debt and costs in this action, 16th July, 1830. *John Green*." In consequence of this undertaking, the plaintiff did not proceed to trial; but Mr. *Green* afterwards refused to pay the debt and costs.

Chilton moved for a rule to shew cause why Mr. *Green*

should not pay the debt and costs in the action, and also the costs of the application.

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The first difficulty in this case is, that the party against whom this application is made is not an attorney of this Court, but conducted this suit through a clerk in court, his agent. It may, therefore, be said, that, not being an officer of this Court, this Court cannot exercise a summary jurisdiction over him. No solemn decision is reported upon this subject, but there are several instances in which such an application has been granted.

[*Bayley, B.*—As at present advised, I think that we ought not to grant this rule, unless some instance can be produced in which such an application has been entertained].

In *Payne v. Johnson* (a) an attachment was granted against an attorney, not of this Court, for the non-payment of a sum of money pursuant to his undertaking. And in *Hudson v. Handley* (b), this Court granted a rule call-

(a) *PAYNE v. JOHNSON, Exchequer, Trinity Term, 1787.*

UPON the motion of Mr. Gibbs, of counsel for *James Parsons*, the defendant's late solicitor, and reading the rule made in this cause, of the 21st day of May last, and the affidavit of *William Proby*, it is ordered that an attachment against *Walter Hill*, gentleman, for non-payment of the sum of 8*l.* 4*s.* 3*d.* allowed to the said *James Parsons* upon the taxation of his bill of costs pursuant to the undertaking of the said *Walter Hill* in that respect, and of the further sum of 8*l.* 18*s.* 4*d.* allowed to the said *James Parsons* for his costs of taxing his said bill of costs.

(b) *HUDSON v. HANDLEY, Exchequer, Trinity Term, 1830.*

A QUO minus having issued against the defendant, *Maudsley*, an attorney of the King's Bench, indorsed upon the writ an undertaking to appear. No appearance having been entered for the defendant—

Chilton obtained a rule, calling upon *Maudsley* to shew cause why he should not cause an appearance to be entered for the defendant, pursuant to his undertaking, and why the defendant should not plead

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ing upon an attorney of the Court of *King's Bench* to shew cause why he should not enter an appearance pursuant to his undertaking, which rule was afterwards made absolute.

In the latter case, the attorney did nothing in the suit, but merely undertook to appear, which he could only do through a clerk in court; here, however, the attorney has conducted this suit throughout. That, therefore, is a much stronger instance than the present. Indeed, a contrary doctrine would paralyze the summary jurisdiction of the Courts over attorneys, a jurisdiction highly beneficial to clients; for if the Court could not act in this instance, an attorney of one Court might always practise in another Court, through another attorney of that Court, with impunity. Over the clerk in court the Court cannot exercise its authority, for he is but the agent, in no way implicated in the transaction. The circumstance of an attorney practising through an agent gives the Court a jurisdiction over the principal.

Secondly, it may be said, that no action can be brought upon this undertaking, and that, therefore, the Court will not interfere in a summary mode. Upon this point, likewise, there is no reported case; but the Court of *King's Bench* have determined, *In re Greaves* (a), that an at-

instant, and take short notice of trial; and why *Maudsley* should not pay the costs of the application, and the costs, if any, caused by his neglecting to appear for the defendant.

This rule was afterwards made absolute.

(a) *In re GREAVES*, Gent., *King's Bench*, Hilary Term, 1827.

AN action having been commenced in the *Common Pleas*, and judgment obtained, *Greaves*, an attorney of the Court of *King's Bench*, but not an attorney of the *Common Pleas*, who was attorney for the defendant, proposed to compromise the action, and agreed verbally to give his two promissory notes for the debt and costs, payable at six and nine

torney, being connusant of the law, shall not, by entering into an undertaking which cannot be enforced by action, deprive the party of his remedy, and take advantage of his own wrong.

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months, in consideration of the plaintiff staying proceedings. This was accepted by the plaintiff; but *Greaves* afterwards declined to give the bills; whereupon *Alderson* obtained a rule calling upon *Greaves* to pay the debt and costs.

Holroyd shewed cause.—There is no cause depending in this Court, and the undertaking by *Greaves* is not necessarily connected with his character of attorney. The only cases in which the Court will interfere in a summary way against an attorney, are either for something done or omitted in a cause or proceeding depending in Court, or where an attorney is employed in a matter so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client. In such cases the Court will interfere in a summary way, to compel an attorney faithfully to execute a trust reposed in him. This appears by the cases of *In re Aitkin*, 4 B. & A. 47; *In re Knight*, 1 Bingh. 91; and *De Woolfe* and others v. —, 2 Chit. Rep. 68. But the promise is void by the statute of frauds; for the original defendant still remained liable, and this undertaking should have been in writing. Now, it is not usual for Courts to interfere to enforce a mere parol promise, where there is nothing criminal. In *Beal v. Lampstaff*, 2 Wils. 371, bail entered into a recognizance at the request of the defendant's attorney, who, in consideration thereof, promised to save them harmless; afterwards, the goods of the bail having been taken, a motion was made, that the attorney should make satisfaction to the bail; *sed per cur.*—This is only a breach of a parol promise, and we cannot interfere in a summary way, here being nothing criminal.

Alderson, contra, was stopped by the Court.

Per Cur.—Even supposing the undertaking to be void by the statute of frauds, this Court may, nevertheless, exercise a summary jurisdiction over one of its own officers, an attorney of the Court. The undertaking was given by the party in his character of attorney, and in that character the Court may compel him to perform it. An attorney is connusant of the law; and if he give an undertaking which he must

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BAYLEY, B.—I feel a very great difficulty in saying that the Court can, upon a summary application, enforce the performance of a contract which could not be enforced by action; but the case cited is certainly an authority for the application.

With respect to the first question, it is advisable that that should be considered, because it is very important that the Court should exercise a jurisdiction over attorneys practising through their agents in this Court. There can be no doubt but that the country attorney was, properly speaking, the attorney in the cause, and that the clerk in court was merely the agent; and, therefore, if there has been misconduct, it is particularly desirable that the Court should have the power of exercising their summary jurisdiction over the country attorney. In the case cited, however, from the Court of *King's Bench*, the action in which the undertaking was given was in the Court of *Common Pleas*, and yet, as the party was not an attorney of that Court, the application was made in the Court of *King's Bench*. Here, likewise, the party is not an attorney of this Court, in which the action is brought; and, therefore, that case is certainly a strong instance against making the application in this Court. The foundation of the jurisdiction of the Court exercised in such cases is, that the party is an attorney of the Court in which the application is made; upon this principle the Court of *King's Bench* must have acted. I cannot, however, but think, that it is very desirable that this Court should have a control over all

know to be void, he shall not be allowed to take advantage of his own wrong, and say that the undertaking cannot be enforced.

Rule absolute. The party to pay the amount of the first note, and the costs of the application, within ten days, and the amount of the second note, within nine months from the time of the agreement.

persons who practise or conduct a suit in this Court: but if, upon inquiry, it should turn out that the practice has been to apply to the Court of which the party is an attorney, that course must be adhered to.

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Rule *nisi*.

No cause was shewn against the rule, which was made—

Absolute (a).

(a) This case was spoken to on several days, and the above is the result of the discussion.

On complaint of one of the defendant's bail, of his having been made liable to pay the plaintiff's debt and costs, by a prosecution on the bail bond, through the misconduct of Mr. *Skinner*, an attorney employed for the defendant, who had put in bail in the Court of *King's Bench* instead of this

Court, a rule was made absolute upon him to reimburse the bail; but it afterwards appearing that *Skinner* was not an attorney of this Court, and that he never acted by himself, or in the name of another attorney, in any one instance in this cause in this Court, the rule was discharged. *Craven v. Billingsley*, C. P. M. 24 G. 2, Barnes 47

BAGNALL v. SHIPHAM.

A RULE *nisi* to change the venue from the county of *A*. to the county of *B*. having been obtained in this case, upon the usual affidavit—

Sir *Wm. Owen* now offered to shew cause against that rule, but—

Chilton interposed, and objected that the affidavits in answer to the rule, which were sworn after the day upon which, by the practice of the Court, the rule was absolute, could not be read.

The rule to change the venue is, in this Court, a rule *nisi*, which makes itself absolute, unless cause be shewn on or before the day mentioned in the rule; and affidavits sworn after that day, cannot be used to shew cause.

The venue can be brought back to the original county in which it was

laid, only upon an undertaking to give material evidence in that county.

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BAYLEY, B.—By the practice of this Court, the rule was absolute before these affidavits were sworn; we must conform to the practice, and the affidavits cannot be read to shew cause.

Sir *Wm. Owen* then moved to bring back the venue to the county of *A.*, upon an undertaking to give material evidence in the county of *A.*, or in the county of *C.*, it appearing upon his affidavits that the cause of action arose, not in the county of *B.*, but in the county of *C.*; and he relied upon the cases of *Bowden v. Glasson* (a), *Hunt v. Bridgeford* (b), *Neale v. Nevill* (c), *Savory v. Spooner* (d), *Powel v. Rich* (e), and *Smith v. Walker* (f).

Chilton, contra, submitted, that the practice of this Court differed from that of the Court of *Common Pleas*, and cited *Emery v. Emery* (g), in which this Court decided, that the plaintiff could only bring back the venue into the county in which it was originally laid, by undertaking to give material evidence in that county.

BAYLEY, B.—It may be desirable that the practice of all the Courts should be assimilated; but, until that is done, we are bound by the practice of this Court. That practice has been correctly stated by Mr. *Chilton*; and unless the plaintiff will undertake to give material evidence in the county in which he originally laid his venue, he can take nothing by his motion.

Rule refused (h).

(a) 5 Price, 359.

(b) 5 Taunt. 259.

(c) 6 Taunt. 565.

(d) 6 Id. 565; 2 Marsh. 278.

(e) 7 Taunt. 178; 2 Marsh. 494.

(f) 2 Moore, 64; 8 Taunt. 169.

(g) 6 Price, 336.

(h) The practice of the three Courts differ from each other in the mode of changing the venue.

First, with respect to the time within which the venue may be changed:—

In the *King's Bench*, the rule to

change the venue must formerly have been moved for within eight days after the declaration was delivered, 2 Salk. 668, which was the time allowed by the rules of the Court for pleading; Id. 2 Str. 1192; but it is now settled, that, where the defendant has not obtained an order for time to plead he may move to change the venue at any time before plea pleaded, R. M. 1654, s. 5. K. B. Gilb. K. B. 339, and he may change the venue after an order for time to plead, though upon the terms of pleading issuably; Say. Rep. 207; 1 Tidd, 608; but not after an order for time to plead, where the terms are to plead issuably, and take short notice of trial at the first or other sittings within Term in *London* or *Middlesex*, because a trial would by that means be lost, Cowp. 511; 7 T. R. 698; but see 1 Wils. 245, *contra*. And after plea pleaded, the venue cannot in general be changed at the instance of the defendant, even though he afterwards have leave to withdraw his plea, and plead *de novo*, with a notice of set-off. 1 Tidd, 608.

In the *Common Pleas*, as in the Court of *King's Bench*, the motion may now be made at any time before plea pleaded, R. M. 1654, s. 8, C. P., notwithstanding the defendant may have obtained time to plead; Willes, 318; Barnes, 489; R. M. 16 Geo. 2, C. P.; unless he be under terms of taking short notice of trial in *London* or *Middlesex*, Barnes, 478; 2 B. & P. 320; 3 Id. 12; or for the adjourned sittings after Term, in *London*. Barnes, 493; 1 Bingh.

186; 7 Moore, 598. The motion cannot however be made after plea in abatement, 4 Bingh. 18, or in bar, Cas. Pr. C. P. 33, 112; 2 Moore, 64; unless the justice of the case clearly require it; 11 Moore, 384; though a rule *nisi* obtained before plea, may, in this Court, after plea be made absolute. Cas. Pr. C. P. 136; Barnes, 492; 3 B. & P. 12; 1 Taunt. 58. And the rule cannot be moved for on the last day of Term, unless the declaration were delivered so late that the defendant had not an opportunity of making the motion sooner. 1 Tidd, 609.

In the Court of *Eschequer*, the venue cannot be changed after a trial has been had, 1 Price, 146, nor after the defendant has obtained an order to plead "on all the usual terms;" for it is considered one of those terms, that the defendant shall not move to change the venue; 3 Price, 3; 2 M'Cl. & Y. 106, and therefore, where the order for time to plead is intended to be without prejudice to a change of venue, it should be so expressed in the summons.

With respect to the mode of changing the venue, the same affidavit is required in all the Courts; but, in the *King's Bench* it is a motion of course upon counsel's signature, absolute in the first instance. 1 Chitt. Rep. 691 a; in the *Common Pleas*, it is a rule to shew cause; and in the Court of *Eschequer*, it is a rule *nisi*, a rule peculiar to that Court, which makes itself absolute, unless cause be shewn on or before the day specified in the rule.

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Lastly, as to the mode of bringing back the venue. In the *King's Bench*, where the rule has been regularly obtained, and is absolute in the first instance, the only mode by which the plaintiff can bring back the venue, is, by a separate motion, which is a motion of course, requiring only counsel's signature, upon an undertaking to give material evidence in the county in which the venue was originally laid. 2 Salk. 669; 6 Taunt. 567; 1 Chitt. Rep. 378. And although in one case, 7 T. R. 205, it was holden, that, where the cause of action accrued in several counties, the venue might be brought back to the original county; it is now fully settled, that the only mode of retaining the venue is by an undertaking to give material evidence in the county in which it was originally laid. 6 East, 433; 2 Smith, 447; 1 Wils. 162; 10 East, 32; 1 Chitt. Rep. 691 a; 2 B. & A. 618.

In the *Common Pleas*, the rule to change the venue being a rule to shew cause only, that Court exercises a discretion upon the discussion of the rule, according to the circumstances of each case;

and in many instances rules have been discharged without requiring any undertaking on the part of the defendant. It is also the uniform practice of that Court, where the cause of action arises in several counties, to discharge the rule to change the venue upon an undertaking in the alternative, to give material evidence in some of them; and, where the whole cause of action arises abroad, to discharge the rule without an undertaking. See 1 Tidd, 611, 612.

In the *Exchequer*, however, although the contrary was in one case decided, 5 Price, 359, it is now the uniform practice not to enter into the circumstances of the case, but, if there be a positive affidavit that the cause of action arose in a different county from that where the venue is laid, to change the venue to that county, unless the plaintiff will undertake to give material evidence in the county in which the venue was originally laid. 6 Price, 336. This undertaking may be given as cause against the rule on or before the day specified in the rule, or, after that time, may be made the subject of a separate motion to bring back the venue.

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1831.

REX (in aid of *HOLLIS*) v. BINGHAM.

AN extent having issued in aid of *Hollis* to recover a debt due to him from the defendant, the matters in difference between *Hollis*, the prosecutor, and the defendant, were referred to *D.*, the defendant entering into a recognizance to abide the award of *D.* Subsequently, *M.* was substituted by rule of Court for *D.*; and *M.* having made his award, a *scire facias* was issued upon the recognizance of the defendant, to which the defendant set out the recognizance, and pleaded *nul tiel agard*; the prosecutor replied, that *M.* was substituted for *D.* by rule of Court, and that *M.* made his award; to which the defendant demurred. Upon the argument (*a*) of this demurrer, it was ordered that the demurrer should be allowed with costs (*b*), and a writ of error having been brought, the judgment of this Court was confirmed. On the 16th *December* last, the defendant taxed his costs in pursuance of the order of the Court; whereupon *Manning* obtained a rule to shew cause why so much of the order as directed the payment of the costs to the defendant should not be rescinded.

Upon a *scire facias* upon a recognizance entered into to abide an award respecting matters in difference upon an extent in aid:—*Held*, that the defendant, having succeeded upon demurrer, was not entitled to costs.

Dampier shewed cause.—The question is, whether the prosecutor, in this case, is liable to pay costs to the party succeeding. The Crown is not an actual party to this suit, and the specialty is not *originally* due to the Crown. The stat. 33 *Hen.* 8, c. 39, s. 54, which gives costs to the Crown in suits on obligations and specialties, does not therefore apply. Under that statute, in suits on specialties and obligations, the Crown is entitled to costs; but where, upon a bond debt to the Crown, an extent issues against a simple contract debtor of the bond debtor, the former is not charge-

(*a*) 3 Y. & J. 101; *ante*, p. 245. for the prosecutor, no mention was

(*b*) In the extract from the Minute Book, set forth in the affidavit made of the costs.

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able with costs. *R. v. Boyle* (a). This shews that there is a material distinction between the Crown and the party in whose aid the Crown process is set in motion; and that the prosecutor in this case is distinct from and unconnected with the Crown, and must be bound by the rules of law applicable to private individuals. Now, if that be so, the prosecutor would be liable to costs. But, moreover, the prosecutor, if he had succeeded, would have been entitled to costs (b); and, therefore, there must be a reciprocity, and he must likewise be liable to pay costs.

Manning, contra.—It is a certain principle, that the King himself neither pays nor receives costs; *Wilkinson qui tam v. Allot* (c); and the same rule applies to a private individual using the name of the King, though suing for his own benefit (d). *R. v. Coram* (e). It is true, that, in some cases, the Court will make an order, calling upon the officer to shew cause why he issued prerogative process, and will award costs to be paid to the party grieved (f); but no such application was made in this case. This is a common law proceeding, though instituted in the office of the King's Remembrancer; and, if judgment had been entered up for the costs, it would have been error; for there is no statute which gives costs in this case. The statutes 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, which give costs in particular cases, do not apply to proceedings in *scire facias*; and the stat. 8 & 9 Wm. 3, c. 11, s. 3, which gives costs in *scire facias*, is confined to *scire fa-*

(a) 1 Price, 434.

(b) If the prosecutor had succeeded, he would have had his costs in this case, not by statute, but because the recognizance being in a penalty, he would have been entitled to deduct the costs from the penalty. See *R. v. Deane*, 2 Anstr. 369. In the same man-

ner, a plaintiff recovering upon a bond, may retain, out of the penalty, the costs of a *ca. sa.* to which he would not otherwise be entitled.

(c) Cowp. 366.

(d) Man. Ex. Pr. Rev. 69.

(e) 1 Anst. 50.

(f) See Man. Ex. Pr. Rev. 69.

cias in civil suits. *R. v. Miles* (a). The statutes on the subject of costs are construed strictly; insomuch, that, in *Golding v. Dyos* (b), it was holden that an avowant in replevin, though actually the plaintiff in the suit, is not a plaintiff within the meaning of the statute 3 *Hen. 7, c. 10* (c).

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Lord LYNTHURST, L. C. B.—The cases of *R. v. Corum*, and *R. v. Miles*, determine this question. The plaintiff is not entitled to costs.

Rule absolute (d).

(a) 7 T. R. 367.

point, overruled.

(b) 10 East, 2.

(d) This case was decided by

(c) See *Ricketts v. Lewis*, 1 B. & Ad. 197, in which the case of *Golding v. Dyos* is, upon another

the Lord Chief Baron, at the Sit-
tings after Term, at *Gray's Inn*.

WINSTANLEY v. EDGE.

Exch. of Pleas.

A *VENIRE facias*, with a notice to appear, having been issued by the plaintiff in this case—

The affidavit for a *distringas* upon a *venire* must be full and distinct, and must disclose circumstances from which the Court may see that the defendant keeps out of the way to avoid personal service.

R. V. Richards moved for a *distringas*, upon an affidavit, that no appearance had been entered for the defendant, and upon the following affidavit as to the mode of serving the *venire*:—

“*J. B.*, of &c., maketh oath and saith, that he did, on the 11th day of *January* instant, serve the above-named defendant with a true copy of a writ of *venire facias ad respondendum* in this cause, appearing to be regularly issued out of and under the seal of this honourable Court, against the said defendant, at the suit of the above-named plaintiff, and returnable on the said 11th day of *January*, by delivering a true copy thereof, and at the same time shewing the said original writ to *E. D.*, at the dwelling-

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house of the said defendant, situate in *King-street*, in *Manchester* aforesaid. And this deponent further saith, that he used all the means in his power to serve the said defendant personally with the said writ of *venire facias*; and that he attended three several days at the dwelling-house of the said defendant for that purpose, but without meeting with the said defendant; that, on the first day of this deponent's attendance, namely, on the 8th day of *January* instant, this deponent saw the said *E. D.*, who informed this deponent that the said defendant was not at home; that this deponent then informed the said *E. D.*, that the object of his calling was to serve the said defendant with the said writ of *venire facias*, and desired the said *E. D.* to inform the said defendant, that he, this deponent, would call again on the 10th day of *January* instant, at eleven o'clock, for the purpose of serving the said defendant; that he this deponent called accordingly at the time appointed, when this deponent again saw the said *E. D.*, who informed him, this deponent, that the said defendant was not there, when this deponent, as on the preceding day, informed the said *E. D.* of the object of his calling, and that he, this deponent, would call again on the following day, at 11 o'clock, for the purpose of serving the said defendant with the said writ of *venire facias*; that, on the following day, being the 11th day of *January* instant, this deponent did accordingly call at the said defendant's dwelling-house at the time appointed, for the purpose of serving her with the said writ; that this deponent again saw the said *E. D.*, who informed this deponent that the said defendant was not there, when this deponent left a true copy of the said writ of *venire facias ad respondendum*, with the said *E. D.*, for the said defendant, and at the same time shewed the said *E. D.* the said original writ. And this deponent saith, that he verily believes that the said defendant hath kept out of the way, for the purpose of avoiding being served with the said writ. And this deponent further saith, that, under the said copy, was written an *Ex-*

glish notice to the said defendant of the intent of such service, pursuant to the statute in that case made and provided. And this deponent further saith, that a writ of *quo minus* was issued out of and under the seal of this honourable Court, on the 5th day of *November* last, against the said defendant, at the suit of the said plaintiff; that an *alias quo minus* was issued thereupon on the 13th day of the said month of *November*; and that a *pluries quo minus* was issued thereupon on the 11th day of *December* last; and that he, this deponent, hath frequently endeavoured to serve the said defendant with the said writ, but without success; and that he believes that the said defendant hath kept out of the way for the purpose of avoiding being served with the said writ; for, though he, this deponent, hath often inquired at the said defendant's dwelling-house where and at what time the said defendant could be met with, he has always been told that the said defendant was not there, nor did they inform him where the said defendant was, or at what time she could be met with, but always positively refused so to do."

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He cited *Pitt v. Eldred (a)*, and submitted, that, if this affidavit was not sufficient, personal service could, in no case, be dispensed with. He further submitted, as a ground for relaxing the practice in such cases, that this Court had no process of outlawry.

BAYLEY, B.—The Court requires in these cases a very full and distinct affidavit, because, as personal service is dispensed with, the Court ought not to grant a *distingas*, unless it be satisfied that the defendant keeps out of the way to avoid the service. Now, this affidavit does not lay a sufficient ground to induce the Court to believe that the defendant kept out of the way to avoid personal service. It is consistent with the facts deposed to that the defendant might have been from home, for there is no statement

(a) *Ante*, p. 147.

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that she was seen in the neighbourhood, nor does the affidavit even state that the question was put, whether she was at home, or, if then absent, at what time she was likely to return. It is true, that the affidavit states a belief that the defendant kept out of the way to avoid the service; but that alone is not sufficient: some foundation must be laid for that belief. If the affidavit had stated that the deponent asked whether the defendant was at home, or, if she were from home, when she would return, and that no answer had been given, that, perhaps, might have been sufficient; but it is consistent with this affidavit, which is silent upon the subject, that the deponent might have been informed that the defendant was from home, and was not likely soon to return. I, therefore, think that the affidavit is insufficient; and we ought not to grant a rule to shew cause, because the plaintiff might have put himself in a better situation. He should have stated every thing that passed upon the different occasions; and if nothing further passed than what is stated, he should have so said.

The affidavit is also defective in not stating that *E. D.* was the servant of the defendant. It is consistent with the statement, that she might have been placed at the house of the defendant for the purpose; and I think that the affidavit ought to state, that the party of whom the inquiries were made, and upon whom eventually the writ was served, was a person connected with the defendant, a servant, or some member of his family.

VAUGHAN, B.—The affidavit should disclose facts and circumstances, from which the Court cannot fail to conclude that the defendant kept out of the way to avoid the service. It is consistent with this affidavit that the defendant was from home at the time.

Rule refused (*a*).

(*a*) There are three modes of By the *first* mode, if the de-
proceeding by *venire* in this Court. fendant be personally served, the

plaintiff may file his declaration, and proceed as upon a *quo minus*.

By the *second* mode, where the defendant cannot be personally served, the *venire* is sent to the Sheriff's office, the Sheriff's officer summons the defendant, which is returned by the Sheriff, and if the defendant does not appear in four days after the return, the plaintiff may issue writs of *distringas*, indorsed to levy 40s. *de die in diem* until the defendant appears; or, after the first *distringas*, if an appearance be not entered, the plaintiff may, upon an affidavit of debt, move the Court to increase the issues. See *Dar's Practice*, 23. This mode of proceeding is not affected by the statute 7 & 8 Geo. 4, c. 71, s. 5. *Nicholson v. Bownas*, 3 Price, 268; *Dwerryhouse v. Graham*, *Id. n.*; *Petty v. Smith*, 2 Y. & J. 111.

Lastly, as in the principal case, the plaintiff may issue a *venire*, with a notice to appear; and, if the defendant cannot be served, may move the Court, or a Baron at Chambers, for a *distringas* to compel an appearance, or to enter an appearance according to the sta-

tute, 7 & 8 Geo. 4, c. 71, s. 5. Of late the Court has been very strict upon this subject, and has required very full and distinct affidavits: and now, in order to obtain a *distringas*, in this mode of proceeding, there must be three attempts at the least to serve the *venire*, the last attempt being on the return day; the party attempting to serve the writ must, on going to the defendant's house, inform some person, a servant or member of the defendant's family, of his object in calling, and appoint some day on which he will call again to serve the writ; he must again attend according to his appointment, and must then make another appointment for a third day, the return day, upon which day he must again attend, and leave the writ with a servant, or some member of the defendant's family. The residence of the defendant must also be stated, and, in addition to the belief of the deponent, circumstances must be stated from which the Court may necessarily infer that the defendant kept out of the way to avoid the service.

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RULES OF COURT.

WHEREAS, by a rule of this honourable Court, made in *Michaelmas* Term last past, it was ordered that hereafter all special bail should be justified before a Baron at chambers, as well in Term as in Vacation: And whereas, it is expedient to repeal so much of the said rule as relates

Justification of
bail.

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to the justification of bail in Term time—It is, therefore, ordered, that, from and after the present Term, the justification of bail in Term time shall, (unless by consent) take place as heretofore in open Court; and that the justification of bail before a Baron at chambers shall be confined to cases of consent, and to justification in Vacation.

Adjourned sittings, &c.

IT is ordered, that, from and after this present Term, the sitting day at *Nisi Prius*, at the *Guildhall* in and for the city of *London*, shall be the second day after every Term, and that such sitting shall be adjourned until such day as the Court shall then direct. And it is further ordered, that in every notice of trial hereafter to be given for the sittings after any Term to be holden at the *Guildhall* aforesaid, it shall be specified whether the cause is intended to be tried on the first day of such sittings, or at the adjournment day; and that in every case in which such notice shall specify that the cause is to be tried at the adjournment day, it shall be sufficient to give such notice eight days before the first day of the sittings after Term, if the defendant or defendants reside above forty miles from the said city of *London*, and four days before the said first day, if the defendant or defendants reside within that distance.

MEMORANDUM.

IN the course of this Term, the Right Honourable Sir *William Alexander*, Knt., resigned the office of Lord Chief Baron, and was succeeded by the Right Honourable *John Singleton*, Lord *Lyndhurst*, Baron *Lyndhurst* of *Lyndhurst*, in the county of *Southampton*; who took his seat on the 18th *January*.

END OF HILARY TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EASTER TERM, 1 WILL. IV.

WILLIAMS *v.* WILLIAMS.

Esch. of Pleas,
1831.

R. v. RICHARDS moved to enter up judgment on a warrant of attorney, which had been given previously to the statute 1 *Wm.* 4, c. 70, to confess a judgment in one of the Courts of Great Sessions of the counties of *Glamorgan, Brecon, or Radnor*. He submitted, that, by the provisions of that act for the transferring of suits, judgment might be entered up in the Court of *Exchequer*.

The Court of *Exchequer* cannot order judgment to be entered up in that Court on a warrant of attorney to confess judgment in the Great Sessions in *Wales*, given previously to the stat. 1 *Wm.* 4, c. 70.

Lord LYNTHURST.—The present case does not come within the words of the 14th section of the act (a).

(a) Which enacts, "That all suits depending [when the act came into operation] in any of the said Courts [in *Wales*] in Law shall be transferred to the Court of *Exchequer*, there to be dealt with, &c.; which Court shall,

for the purposes of such suit only, be deemed to have all the power and jurisdiction, to all intents and purposes, possessed before the passing of the act by the Court from whence such suit shall be removed.

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1831.

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WILLIAMS.

BAYLEY, B.—There is no suit depending. The case in question is not provided for by the act of Parliament, and, therefore, this Court cannot interfere.

Rule refused.

PITT v. WILKS and Another

The plaintiff having sued out a *quo minus* against one defendant, and a *venire* against the other, and separate appearances having been entered, and separate rules to declare given, declared jointly against both:—*Held*, that the declaration was regular.

THE plaintiff sued out a *quo minus* against one defendant, and a *venire* against the other; the defendants entered separate appearances, and separate rules to declare were given. The plaintiff declared against the two defendants jointly; and now—

Sir William Owen moved to set aside the declaration for irregularity, upon the ground that it did not correspond with the process. He submitted, that the plaintiff could not declare jointly against the two defendants who had been brought into Court by writs of different kinds, and that he was bound by the rule that the declaration should correspond with the process. He referred to the rule in the *King's Bench* (E. T. 1827), by which it is ordered, that in all actions by bill the mesne process shall contain the name of the defendant, or (if more than one) of all the defendants in that action (a); and cited the case of *Lewin v. Smith* (b).

(a) By a rule of this Court, M. 1 Wm. 4, *ante*, p. 275, it is ordered, "That where there are more than four defendants in a joint action to be commenced in this Court, residing in the same county, the whole number of such defendants shall be named in one writ. It has been decided, upon a similar rule in the *King's Bench*,

Evans v. Whitehead, 2 M. & R. 367, that, upon a writ against two, a declaration against one only is good. But the writs in the principal case were issued before the rule of this Court; and, therefore, that case cannot be considered as a decision upon the construction of the rule.

(b) 4 East, 589.

BAYLEY, B.—If the plaintiff had issued two writs of *quo minus*, one against each defendant, there would have been separate appearances, and separate rules to declare might have been given; but still the plaintiff might have declared jointly against both. Formerly, more than four defendants could not be joined in one writ; and if there had been more defendants than four, separate writs must have been issued. The process is merely to bring the parties into Court, and, being in Court, the plaintiff may declare against them as he may think proper. In *Lewin v. Smith*, the process was bailable.

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Per Curiam—

Rule refused (a).

(a) In *Gent v. Abbott*, 2 Moore, 87, it was decided, that a plaintiff may declare jointly against two defendants, of whom one appears upon an original *quare clausum fregit*, and the other is sued by special *capias*. And see *Russell v. Buchanan*, 6 Price, 139.

The KING v. HIND, Clerk.

(On a transcript of an Outlawry.)

Revenue.

THE defendant having been outlawed in the Court of *King's Bench*, writs of special *capias utlagatum* were issued, directed to the Sheriffs of *Shropshire* and *Staffordshire*; who took inquisitions accordingly, and the Juries found that the defendant was possessed of benefices, but of no lay fee. These inquisitions were returned to the Court of *King's Bench*; and a transcript of the outlawry with the inquisitions having been brought into this Court, and entered as read—

Where to a special *capias utlagatum* the Sheriff returns an inquisition finding that the defendant has benefices but no lay fee, this Court will award a writ of sequestration upon reading the transcript of the outlawry and inquisition.

Archbold moved that a writ of sequestration might be awarded to the Bishop of *Lichfield and Coventry*, to se-

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questrate the ecclesiastical profits of the benefices. He admitted that there was no decision to warrant the application, but referred to the Minute Book of this Court, 26th June, 1776 (a), and contended that, upon principle, the writ should be awarded.

The Court awarded the writ.

Wednesday,
June 26, 1776.

(a) *Between* our Sovereign Lord the KING and SIDNEY SWINNEY, Doctor of Divinity, otherwise called the Rev. Dr. SIDNEY SWINNEY, late of SCARBOROUGH, in the county of YORK, Defendant—*On a transcript of an Outlawry.*

WHEREAS by an inquisition taken at the Castle of York, in the county of York, on the 22d day of June, instant, before Giles Earle, Esq., Sheriff of the said county, by virtue of a writ of special *capias utlagatum* to him directed, issuing out of our Court of Common Bench, at Westminster, against the said defendant, outlawed at the suit of Godfrey Bosville, Esq., in a plea of debt, for the sum of 1,800*l.* It was found upon the oath of Richard Clark, and other good and lawful men of the said Sheriff's bailiwick, that the said defendant was a beneficed clerk, to wit, Rector of Thuring, in the county of York, and also Rector of Warton-in-the-Street, in the same county, and that he was in right of his said rectories seised of the tenements, tithes, compositions, and hereditaments in the said inquisition particularly mentioned, as by the transcript of the said writ and inquisition, returned into this Court, and there remaining of record, in the custody of his Majesty's Remembrancer, more fully appears. Now, upon the motion of Mr. Kenyon, of counsel on behalf of his Majesty, praying that a writ of sequestration may be awarded under the seal of this Court, directed to the Archbishop of York, for sequestrating the ecclesiastical profits of the said two rectories, and upon reading the said transcript—It is thereupon ordered accordingly.

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EDGE v. STRAFFORD.

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the plaintiff would demise six rooms and apartments in and parcel of a dwelling-house of the plaintiff, for a certain term, to wit, the term of two years from &c., at and under a certain rent, &c. the defendant undertook and promised to become tenant to the plaintiff, &c., and to enter &c., on &c. Averment—That the plaintiff did demise and let to the defendant the said rooms, &c., for the said term of two years, at &c. Breach—That the defendant did not take possession on &c., or at any other time, or pay the rent. Special damage—That the rooms were unoccupied and out of repair, and injured, and that the plaintiff had paid money to fit up and prepare the same for the reception of the defendant.

The second count was similar, but on an *executed* consideration; and there were counts for use and occupation. Plea—*Non assumpsit*.

At the trial, at the last Great Sessions for *Chester*, before *Jervis, J.*, the plaintiff proved, that the defendant, on the 12th *April*, agreed, by parol, to take the lodgings from the 25th for two or three years, at the weekly rent of 2*l.*, which was more than two-thirds of the annual value of the lodgings. Upon this evidence, *Temple*, for the defendant, contended, upon the authority of *Inman v. Stamp (a)*, that this was a contract for an interest in land

A contract to let furnished lodgings is a contract for an interest in land within the fourth section of the statute of frauds.

A tenant who agrees to take furnished lodgings, but does not enter, is not liable in an action for use and occupation.

The effect of the first, second, and fourth sections of the statute of frauds, so far as they apply to parol leases not exceeding three years, is, that the leases are valid, and that whatever remedy can be had upon them in their character of leases may be resorted to, but they do not confer the right to sue the lessee for damages for not taking possession.

A declaration stated, that, in consideration that the plaintiff would demise to the de-

fendant furnished lodgings for a certain term, to wit, two years, the defendant promised, &c., and alleged, by way of performance, that the defendant did demise, &c. for the said term of two years: the evidence was, that the defendant agreed to take the lodgings for two or three years:—*Held*, that the consideration for the promise was not truly stated, and that the allegation of performance rendered the term stated material, notwithstanding it was laid under a *videlicet* in setting forth the consideration. *Aliter* on a count on a consideration *executed*.

(a) 1 Stark. N. P. 16.

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within the meaning of the 4th section of the statute of frauds (a), and that, therefore, the agreement not being in writing, was void. The learned Judge was of opinion that the case came within the exception contained in the second section of that statute, but reserved the point, and the Jury found a verdict for the plaintiff—damages 2*l*.

In *Michaelmas* Term, *Temple* obtained a rule *nisi* to enter a nonsuit; against which—

John Jervis and *Lloyd* shewed cause.—This is not a contract within the fourth section of the statute of frauds. The case of *Inman v. Stamp* was decided at *Nisi Prius* without reference to the case of *Riley v. Hicks* (b), which is precisely in point, and determined that a contract like the present was not within that section, and without advert- ing to the terms of the statute, which are inapplicable to such a case. By the statute, it is enacted, that no action shall be brought whereby to charge any defendant upon any contract or sale of lands, tenements, or hereditaments, or any interest concerning them, unless the agree- ment, &c., be in writing. The words “contract or sale” must be read contract for the sale, &c.; they are other- wise unintelligible, and there is no case but that of *Inman v. Stamp* which has decided, that a contract for the hire of an interest in land is within these words. The sale of growing crops has been held to be within this section, because, not being mature, some interest is to be derived from the soil (c). But where the crop is mature, and the land is merely a warehouse for the crop, then the case is not within this section (d).

Then, is this case within the exception contained in the

(a) 29 Car. 2, c. 3.

(b) 1 Str. 651.

(c) *Emmerson v. Helis*, 2 Taunt.
38; *Crosby v. Wadsworth*, 6 East,
602; *Scorell v. Boxall*, 1 Y. & J.

396; see *Evans v. Roberts*, 5 B. &
C. 839.

(d) *Warwick v. Bruce*, 2 M. &
S. 205.

second section of this statute? It is not necessary that the holding should commence from the day in which the agreement is made. *Riley v. Hicks*. And a lease by parol for a year and a half, to commence after the expiration of a lease which wants a year of expiring, has been decided to be good, if it does not exceed three years from the making (a). But it may be said, that the extent of the lease is not ascertained. In the first place, the rent is payable weekly, and it would at least enure as a lease for a week; but, although formerly an estate existing by the mutual will of the lessor and lessee might be determined at any time by any party, an estate so precarious has long been looked upon with increasing strictness; and it is now clearly settled, that where the relation of landlord and tenant is created without any limitation as to time, such tenancy shall be from year to year, and this notwithstanding the statute of frauds, which enacts, that such tenancies shall have the effect of estates at will only. *Doe d. Regge v. Bell* (b), *Clayton v. Blakey* (c).

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Temple, contra.—If this is not a lease, then it is not within the exception contained in the second section of the statute of frauds. This exception has been considered to be confined to leases executed in possession; but it is immaterial to discuss this point, because one main ingredient in a lease is here wanting—certainty of term. It is said, that this would enure as a tenancy for a year or at least for a week, but suppose the defendant had sued for a specific performance of the agreement, for what term could a lease be decreed? This is a test by which the validity of this agreement may be tried. If the agreement is good, it may be specifically performed; and yet it is impossible to say for what term the lease should be decreed to be made.

(a) B. N. P. 173.

(b) 5 T. R. 471.

(c) 8 T. R. 3. See *Wilson v. Abbott*, 3 B. & C. 88, 4 D. & R. 693.

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But this is void, as being a contract for an interest in lands within the 4th section. *Inman v. Stamp* is expressly in point. It is said however, that *Riley v. Hicks* is opposed to that decision. *Riley v. Hicks* is but a decision at *Nisi Prius*; and in *Inman v. Stamp* (a), *Dampier, J.*, in effect over-ruled that decision, although he admitted that the practice had been with the case of *Riley v. Hicks*.

Cur. adv. vult.

The judgment of the Court was now delivered by BAYLEY, B.—The declaration in this case contains two special counts, and two counts for use and occupation. The first special count is upon an executory consideration—in consideration that the plaintiff would demise to the defendant for a certain term, to wit, for the term of two years, the defendant promised to become tenant at the rent of 2*l.* per week; and it alleges, by way of performance, that the plaintiff did demise for the said term of two years; and the breach is, that the defendant did not take possession, or pay the rent. It appeared upon the evidence that the defendant's brother, who was the defendant's agent, proposed to take the rooms, not barely for two years, but for two or three, and to this proposal the plaintiff acceded; and if the legal consequence of such an agreement be, as it is, that the defendant should be entitled to hold the premises on at will after the expiration of the two years, unless something was done to prevent him, and that his tenancy was not, at all events, to expire at the end of two years, which upon a lease for two years *simpliciter* would be the case, the consideration for the defendant's promise, as stated in the first count, is not truly set forth; and there is no averment of performance of that which really was the consideration. It is true, the term, as stated as the considera-

(a) 2 Sel. N. P. 821.

tion for the promise, is stated under a *videlicet*; but it is not on that account the less material, because the allegation of performance is, that the plaintiff did afterwards let to the defendant for the said term of two years. The plaintiff therefore cannot recover on the first count.

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The second count is upon an executed consideration—in consideration that the plaintiff had demised; and though there is the same mistake as to the duration of the term, yet, as that is upon a statement under a *videlicet*, I am disposed to think the variance upon that count is not material; and we must, therefore, see whether there is any other fatal objection to that count.—That count states the defendant's promise to have been, that he would become tenant at the rent of 2*l.* payable weekly, and to enter on the 25th April, and assigns as a breach, that the defendant did not take possession or pay 2*l.* a-week, by means whereof the rooms had been unoccupied, and had become out of repair, and that the plaintiff had laid out money in preparing rooms for defendant's reception. This count does not state an unqualified promise to pay 2*l.* a-week, upon which, perhaps, the plaintiff might have been entitled to have sued, though defendant had never entered, and the relation of landlord and tenant had never been created; but his only promise is, that he will become tenant, and enter; and there is no promise to pay 2*l.* *per* week, except as that is a consequence of his becoming tenant. If, therefore, upon the evidence, the defendant never became tenant, there is nothing in the promise stated to entitle the plaintiff to recover any thing, except damages for breach of his promise, *viz.* for not becoming tenant, and for not entering; but, against his recovering these damages, the 4th section of the statute of frauds is relied upon; and the case of *Inman v. Stamp* (a) is pressed as an authority in point. The statute of frauds provides, that no action shall be

(a) 1 Stark. N. P. 16.

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brought whereby to charge any person upon any contract or sale of any lands or any interest in or concerning them, unless such contract were in writing; and in *Inman v. Stamp* Lord *Ellenborough* ruled, that a contract for letting lodgings was a contract for an interest in lands; and that an action could not be maintained against the party who had refused to perform his agreement for taking them, because there was nothing to bind him but a verbal agreement. It was supposed, upon the argument, that *Riley v. Hicks* (a) was at variance with *Inman v. Stamp*, but I cannot see what bearing one of those cases has upon the other. The only point decided in *Riley v. Hicks* is, that a lease, though it were to commence *in futuro*, would be within the exception in the statute of frauds, if it did not exceed three years from the making; but how that bears upon the decision in *Inman v. Stamp*, I do not see. It may be said, that it is strange that the second section of the statute has made a lease for less than three years from the making valid, and yet, that no action shall be maintainable upon it until it is made effectual as a lease by the entry of the lessee; but, first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded upon it a claim for damages, which might far exceed what he could claim under it in the character of a lease; or, secondly, this distinction might not have been contemplated, but may be the result of the true construction of the statute of frauds. The first section of that statute provides that all leases, estates, interests of freehold, or term of years, or any uncertain interest in lands made by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only; except, nevertheless, all leases not

(a) *Strange*, 657.

exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds of the full improved value. The 4th section enacts, that no action shall be brought whereby to charge the defendant upon any contract or sale of lands, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some memorandum thereof, be in writing. Is then the agreement on which this action is brought, a contract of an interest in lands? *Inman v. Stamp* says distinctly, that it is; and, unless that case can be successfully impeached, it must govern the present. But can that case be successfully impeached? Is not the agreement on which this action is brought, a contract of an interest in lands? The defendant, by the lease, has an *interesse termini* only; the agreement upon which the action is founded, is to force him to take an ulterior interest, and clothe himself with the possession. If it be said, that the agreement upon which the action is brought, is merely a result by operation of law from the demise, and that, as that is a valid demise, whatever is a result from it, must be valid also, the answer seems to be, that the fourth section takes away the right to sue upon this result, and that though the result be not invalid, it cannot be made the foundation of an action. The effect then of the statute of frauds, as far as it applies to parol leases not exceeding three years from the making, is this, that the leases are valid, and that whatever remedy can be had upon them, in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession. I am therefore of opinion, that the verdict cannot be supported upon the second count.

This brings us to the counts for use and occupation. These counts charge the defendant for the use and occupation of rooms had, held, used, occupied, possessed, and enjoyed by him. Is this true as to any of the points of having, holding, using, occupying, possessing, or en-

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joying? Before entry by the lessee, what effect has a lease upon the land? It creates an *interesse termini* in the lessee, which the lessee may grant over, but the land still remains in the lessor. A release to the lessee will not enlarge his estate: Why? Because he has nothing in the land till entry. The whole estate is in the lessor (a). The lessor cannot grant over the estate by the description of the reversion: Why? Because the possession is wholly in him (b): so the lessee cannot bring trespass, because he has no possession. Upon the whole, therefore, I am of opinion, that there is no count upon which the plaintiff is entitled to recover; and, consequently, that the rule must be made absolute.

Rule absolute.

(a) Co. Litt. 26. b.; Litt. s. 419; Co. Litt. 270. a.

(b) Cro. Car. 110; Co. Litt. 270.

LAUGHER v. LAUGHER.

To support an attachment for the non-performance of an award on demand made by a third person who acts under a power of attorney, the execution of the power of attorney must be shewn by the subscribing witness, and a copy of the power of attorney must be left with the party upon whom the demand is made.

JOHN JERVIS, on a former day, had obtained a rule *nisi* for an attachment for the non-performance of an award. The demand was sworn to be made "under and by virtue of a power of attorney signed and delivered by the plaintiff," to the party by whom the demand was made, but there was no affidavit by the subscribing witness of the execution of the power of attorney, nor was it sworn that a copy of the power of attorney was left with the defendant, when the demand was made.

Clarke and Holroyd shewed cause.—To bring a party into contempt, a demand must be made by the party to whom the money is awarded, or by his agent, legally authorized. In this case, there is no legal evidence of the authority of the agent, for the power of attorney could only be proved by the subscribing witness. Accordingly, it is

stated by Mr. *Tidd* (a), that there must be an affidavit of the execution of the award and power of attorney.—*Secondly*, a copy of the power of attorney should be left with the party upon whom the demand is made (b), because he is entitled to be satisfied that he is not paying his money to one who has no authority to receive it.

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John Jervis, contra.—The affidavit sufficiently shews that the power of attorney was executed by the plaintiff; and the authority referred to does not state that the subscribing witness must depose to that fact. In the case of an obligation, the subscribing witness must be called to explain if any thing took place at the time of the execution, but in the case of a dry authority to receive money, there is no necessity or reason for that rule. In *Longman v. Holmes* (c), an unstamped indorsement upon the award was holden a sufficient authority to receive the money awarded. Upon the second point also, no decision has been cited. Where the original power of attorney is shewn, the party from whom the money is demanded has an opportunity of ascertaining the authority of the agent; but it seems to have been decided in *Bass v. Maitland* (d), that it is not even necessary to shew the original power of attorney.

Per Curiam.—The practice is correctly stated by Mr. *Tidd*. A mere parol authority to demand the performance of the award would not be sufficient, and if a power of attorney is necessary for that purpose, it must be shewn by legal evidence that that delegation of authority was properly executed. It is also necessary that a copy of the power of attorney should be left with the party upon whom the demand is made, in order that he may be satisfied that

(a) Page 837.

(b) *Tidd's Pract.* 837.

(c) 2 Black. 990.

(d) 8 Moore, 44.

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the party making the demand acted under a legal authority.

Rule discharged with costs (a).

(a) See *Jackson v. Clarke*, 1 M'Clel. 72; 13 Price, 208. *Hartley v. Barlow*, 1 Chitty's Rep. 229.

IN THE EXCHEQUER CHAMBER.

(In error from the Court of Exchequer.)

PAWLETT v. The Corporation of STAMFORD.

The grant of a fair or market "cum omnibus tolmetis, et aliis proficuis predictis feriis sive mundinis pertinentibus et spectantibus," passes a reasonable toll to the grantee, though the amount of toll be not specified.

IN an action of debt for tolls, the question was, whether, under the grant of a fair or market, "*cum omnibus tolmetis et aliis proficuis predictis feriis sive mundinis pertinentibus et spectantibus*," the amount of toll not being specified, a toll could be demanded. The Court of *Exchequer* decided, that the grant passed a reasonable toll (a); and, upon a writ of error, the Chief Justices of the Courts of *King's Bench* and *Common Pleas*, after argument by *Clinton* for the plaintiff in error, and *Hildyard* for the defendants in error, advised the Lord Chancellor to affirm the judgment.

Judgment affirmed.

(a) See *ante*, p. 57 *et seq.*

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GODKIN v. REDGATE.

R. S. RICHARDS moved for a *distringas* upon the following affidavit: "That the deponent used all means in his power to serve the defendant personally, with the copy of the writ of *venire facias*, having attended at the dwelling-house of the defendant, on the 1st of *April*, when deponent saw the daughter of the defendant, and informed her he had a writ against her father, and wished to serve him with a copy of it; when she said, that her father was not at home, nor was he likely to be at home; that deponent told her he would call at 12 o'clock the next day, to serve her father with a copy of the writ; that he accordingly called at the house of the defendant, and inquired for the defendant, when he was informed by the defendant's son, that his father was from home, and not likely to be at home; that deponent explained to the defendant's son, that he had a writ against his father, and said he would call again; that deponent called again on the return day, pursuant to a further notice, and again inquired for defendant, when defendant's son again told the deponent, that his father was from home, and was not likely to be at home; that deponent believes that the defendant has kept out of the way, to avoid the service of the said writ, for the following reasons, because deponent had, upon a previous occasion about twelve months ago, a copy of a writ to serve upon the defendant, but was not able to serve him; and has been informed, and verily believes, that his circumstances are deranged, and that he keeps out of the way to avoid being arrested, or served with process."

The Court will not grant a *distringas*, upon an affidavit of the belief of the deponent that the defendant keeps out of the way to avoid personal service, but it must also be made to appear, to the satisfaction of the Court, that the defendant keeps out of the way to avoid service, and the grounds for the belief must be stated.

BAYLEY, B.—The Court requires, not only an affidavit of the belief of the party, that the defendant keeps out of the way to avoid personal service, but of circumstances to shew that that belief is well founded. It is consistent

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with this affidavit, that the defendant was from home upon business; for it is not sworn that he was seen in the neighbourhood, or that he was at home in the interval between the first and last time, when the deponent went to serve the writ. It does not appear whether every material part of the conversations with the son and daughter of the defendant is disclosed in the affidavit.

Rule refused (a).

(a) See *Winstanley v. Edge*, *ante*, p. 381.

WHITEHORNE v. SIMONE.

*Affidavit for
distringas.*

MANNING moved for a *distringas*. The affidavit stated that the deponent called at the house of the defendant, on the 5th *April*, to serve him with the *venire*, when the servant of the defendant said, her master was not at home. The deponent appointed to call again on the following day, which he did, but did not see the defendant; and on the 15th *April*, the deponent called again pursuant to an appointment, and, not finding the defendant, left the process with the defendant's servant.

LORD LYNDHURST, C. B.—The affidavit does not shew that the defendant was at home when the deponent called, nor does it state that the servant said the defendant would be at home at the times appointed.

BAYLEY, B.—The statutes 51 *Geo.* 3, c. 124, and 7 & 8 *Geo.* 4, c. 71, s. 5, are, in this respect, the same. Upon the former it was holden by the Court of *Common Pleas*, in *Turner v. Wall*, and *Down v. Crew* (a), that the facts upon which the belief of the deponent were founded, must be

(a) 5 Taunt. 520; 1 Marsh. 267.

stated, and that it was not sufficient merely to swear to belief that the defendant kept out of the way to avoid the service. No grounds for the deponent's belief are here stated; on the contrary, it does not appear, that the whole of the servant's answer respecting her master is stated in the affidavit, or that she said he was then at home, or would be at home before the time at which the deponent appointed to call again.

GARROW, B.—If the mere circumstance of the defendant being from home upon three occasions were sufficient without more, a *distringas* might in every case be obtained, by making visits purposely timed during hours when the defendant is known to be absent at his daily employment.

BOLLAND, B., concurred.

Rule refused.

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MARSHALL and Another, Executors of TALFORD, v. BROAD-
HURST.

ASSUMPSIT. The declaration contained two sets of counts. The first set of counts was for work and labour done, and materials found, and goods sold and delivered by the testator, laying the promises to the testator; and the second set of counts was for work and labour done, and materials found and used about such work and labour, and goods sold and delivered by the plaintiffs as executors, laying the promises to the plaintiffs as executors. Plea—*Non assumpsit*.

At the trial at the last Assizes for *Cheshire*, before *Tindal*, C. J., the following appeared to be the facts of the case:—The defendant employed the testator to erect a temporary gallery and other wood work for the

A. agrees to do certain work, and dies before the work is begun: the executors of *A.* do the work, using the materials of *A.*:—*Held*, in an action by the executors, in their representative character, for work and labour done, and materials found, that the executors might recover the value of the materials; and *semble*, that they might also recover for the work and labour as executors of *A.*

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purposes of a public dinner; shortly after the order was given, and before it was begun, the testator died, and the plaintiffs, as executors, performed the work, using the materials of the testator. Upon these facts, it was objected, that the plaintiffs could not recover: that there was no evidence to support the first set of counts; and, with respect to the second set of counts, that there was no evidence of goods sold; that the work and labour were done on the personal contract of the executors, for which they could only sue in their individual capacity; and that the materials alleged to have been supplied for *such* work and labour could not be separated from the work and labour. The learned Chief Justice was of opinion, that the plaintiffs could not recover for the work and labour, but thought that they might for the materials, because the allegation was divisible; and the plaintiffs had a verdict for the amount of the materials, with liberty for the defendant to move to enter a nonsuit.

Lloyd now moved to set aside the verdict and enter a nonsuit. The plaintiffs cannot recover for the materials on the count for goods sold and delivered, because the contract is entire, though composed of different things, and cannot be separated. *Cottrell v. Apsey* (a). Can they then recover for the materials in the counts for work and labour, and materials supplied for such work by the executors? It was decided at the trial that they could not recover for the work and labour, and there was no evidence of work done by the plaintiffs *as executors*, and therefore no materials could be supplied for *such* work. Until the job is completed, the materials belong to the party by whom the job is done. It is the duty of the executors to dispose of the assets of the testator: they cannot carry on his business, unless they do so at their own risk. If they may do so in one instance, they may in every case; and so the estate of the

(a) 1 Marsh. 581, 6 Taunt. 324.

testator may be wasted by the speculations of his representatives. But it is clear that the plaintiffs might sue for the whole in their individual capacity; and it was decided, at the trial, that, for the work and labour, they must so sue, and therefore the defendant would be liable to two actions in respect of the same job. It was a personal engagement of the testator, which ceased at his death, and became a personal contract of the executors when undertaken by them, for which they could only sue in their individual capacity.

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Per Curiam.—It is a plain rule, that, whenever the subject-matter of the action would, when recovered, be assets, the executor may sue in his representative character. *Ord v. Fenwick* (a), *Cowell v. Watts* (b). If a party contract for himself and his executors to build a house, and die, the executors must go on, or they would be liable to damages for not completing the work; if they go on, it is work and labour done by them as executors; they may recover as executors, and the money, when recovered, will be assets in their hands. Suppose a party to have engaged to build a house, and to have procured all the necessary materials, in the event of his death may not the executors complete the work, or must they dispose of the materials at a loss to the estate? Or if a man build half a house, and die, if the executors complete the work are there to be two actions in respect of the same job? Such a rule would, in many cases, operate much to the deterioration of property. If, for instance, a bookseller undertake to publish a work in parts, and, before the completion, die, a subscriber has a claim upon his estate to complete the work, for otherwise those parts which he has purchased, upon the faith of the work being completed,

(a) 3 East, 110.

(b) 6 East, 405.

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are useless. When the law speaks of executors not carrying on the business of their testator, it means that they are not to buy and sell. We do not say that executors are bound to go on to an indefinite extent, but it is reasonable that they should do so to a certain extent. For instance, if a man make half a wheelbarrow or half a pair of shoes, and die, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state. It is otherwise, where the testator enters into a personal engagement to be performed by himself only.

In the absence of authority to the contrary, it seems reasonable that the plaintiffs should recover under the circumstances of this case.

Rule refused.

—◆—
REX v. MARSH.

[*Upon an extent*].

Revenue.

A sale under an extent is not violated as against a purchaser by the agent of the Crown making a *bond fide* bid for himself.

SOME freehold property belonging to the defendant had been sold under an order of this Court in 1829. On that occasion the purchaser was discharged, on the ground of a puffer having been employed on the part of the Crown (a).

A second sale took place in *March*, 1831. On that occasion one *Jervis Nokes* was the highest bidder, and was declared the purchaser for 240*l*.

R. Scarlett had obtained the usual rule to confirm the purchase; against which—

Beames now shewed cause, on the ground that Mr.

(a) See 3 Y. & J. 331.

Driver, the surveyor and agent for the Crown in this business, had attended the sale, and had bid up to 235*l.*, the next bidding to that of the purchaser. *Driver* was the Crown agent, to whom persons had been referred for information and particulars about the sale; and the printed particulars stated the sale to be without reserve. *Driver* was the only bidder besides the purchaser. *Driver* swore that he was a true and *bond fide* bidder, and intended to purchase for himself, and would still be willing to take the property at his own bid.

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Beames, for the purchaser.—The question is, whether the agent for the purchaser can interfere in the manner in which the Crown agent has done in this case. It is a clear rule in Courts of equity, that a person who is an agent can never purchase for himself. He could not, if he had been the highest bidder, have compelled the Crown to complete the purchase. The Crown ought not to sanction its own agent as a purchaser. It is only another mode of puffing; and if *Driver* had been the purchaser, the Crown could not have sustained the sale as against the creditors.

LORD LYNTHURST, C. B.—The creditors might have had a right to apply to set aside the sale; but you are applying on the part of the purchaser. The reason why an agent is not allowed to bid is for the sake of the seller. He is not allowed to avail himself of the knowledge he may have acquired as agent.

Rule absolute.

Revenus,
1831.

REX v. WRANGHAM.

An agent of a fire insurance company, who has received premiums and duties for the office to whom he has given security, is liable to a writ of immediate extent for the duties.

THIS was a writ of immediate extent against the defendant, who had been a country agent to a Fire Insurance Company, and had received monies for duties and premiums. The extent was for the amount of the duties.

D. Pollock moved to set aside the extent, on affidavits shewing that the defendant had given security to the Fire Office; and he urged that the defendant was liable to the Fire Office alone, for whom he received the premiums and duties, which constituted one entire sum, for which they had taken security. He contended, that there was no privity between the defendant and the Crown; and that the extent was a mere device of the Insurance Office, to enable them to get the full amount of the duties, for which they were really answerable, paid out of the funds of the general creditors.

Shephard, contra, contended, that, wherever a party has knowingly in his hands monies belonging to the Crown, he is accountable to the Crown; and that his being also liable to the Insurance Company on his bond could make no difference.

Lord LYNDHURST, C. B.—The defendant is indebted directly to the King. Whoever receives money of the Crown, becomes an immediate debtor to the Crown. The receipt of money belonging to the Crown constitutes a privity with the Crown.

Rule refused.

Revenue,
1831.

The ATTORNEY-GENERAL v. CARPENTER.

THE defendant having been served with a notice to plead, applied at the office to be allowed to plead, and was informed, that he could only plead in person by order of the Court. Accordingly, he now appeared in Court to move for a rule that he might be allowed to plead in person.

A defendant to an information may plead in person in Court.

The Court, at first, granted the rule; but afterwards, upon the suggestion of the defendant, directed him to hand over his plea in Court to the officer; which he accordingly did.

In the Matter of the Estate of VIVIAN, deceased.

AMOS moved for an attachment, absolute in the first instance, against the executors of this estate, for not accounting to the legacy office, pursuant to a rule obtained for that purpose.

The rule for an attachment, for not accounting to the legacy office, is a rule *nisi*, which makes itself absolute by a certain day, unless in the meantime cause be shewn.

The Court said, that it could only be a rule to shew cause; but subsequently granted a rule *nisi*, to be absolute by a day certain, unless cause was shewn on or before that day.

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1831.

RISDALE v. KELLY.

A declaration in debt demanded 60*l.*, and contained six counts for 10*l.* each; and the defendant pleaded that he did not owe the said sum of 10*l.* above demanded. The plaintiff treated this plea as a nullity, and signed judgment. The Court set the judgment aside.

THE declaration in this case, in debt, demanded 60*l.*, and contained six counts, each of which was for 10*l.* parcel, &c.

The defendant pleaded, that he did not owe the said sum of 10*l.* above demanded, or any part thereof. The plaintiff signed judgment for want of a plea; and *Ball* obtained a rule to shew cause why the judgment should not be set aside; against which rule cause was now shewn by *Jervis* and *Temple*, who relied upon *Macdonnell v. Macdonnell* (a).

Ball, in support of his rule, relied upon *Attwood v. Bonacich* (b), where Lord *Tenterden* intimated an opinion, that the words "of ten pounds," might, in such case, be rejected as surplusage.

LORD LYNTHURST, C. B.—No sum of 10*l.* is demanded in this declaration. Therefore, when you say that you do not owe the said sum of 10*l.*, above demanded, I should incline to think that the words "of 10*l.*" may be rejected as surplusage. At all events, it is too much to treat such a plea as a nullity.

BAYLEY, B.—In *Macdonnell v. Macdonnell*, the question was, whether the plea was an issuable plea under a Judge's order; which is quite a different question from the one now before the Court. I argued, in that case, that the plaintiff had taken his judgment for too much; but the Court said, you are under terms to plead issuably to the whole declaration.

If the words "of 10*l.*" can be rejected as surplusage,

(a) 3 Bos. & Pul. 174.

(b) 1 D. & R. 474.

then the present is a good plea to the whole, and would be so treated on a trial. No sum of 10*l.* is here demanded; the sum demanded is 60*l.*, and the words " of 10*l.*" are obviously inapplicable to the declaration, and may therefore be rejected.

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The rest of the Court concurring, the rule was made—

Absolute.

MASON v. CLARKE.

THIS case was tried at the sittings in Term, and, on the authority of *Kirkham v. Marten* (a)—

Thesiger was allowed to move for a new trial within four days after the return of the *distringas*, although more than four days had elapsed since the trial.

(a) 2 B. & A. 614.

Where a cause is tried at the sittings in Term, a motion may be made for a new trial, at any time within four days after the return of the *distringas*, although more than four days have elapsed since the trial.

POOLEY, Assignee of SYERS, v. MILLARD.

TROVER by the assignee of a bankrupt. At the trial, before *Gaselee, J.*, at the last *Lent* Assizes for the county of *Norfolk*, the plaintiff, to prove the petitioning creditor's debt, notice to dispute which had been given, produced and proved a bill of exchange for 56*l.* drawn by the petitioning creditor, and accepted by the bankrupt. The plaintiff then proved that another bill of exchange, for 70*l.*, drawn by the petitioning creditor, and accepted by the bankrupt, had been produced, properly stamped, before the commissioners at the opening of the commission.

Where, in an action by the assignee of a bankrupt, it appeared that a bill drawn and indorsed by the petitioning creditor, and accepted by the bankrupt, had been produced at the opening of the commission, and had been then examined by the commissioners, and had

afterwards been lost, and, though search had been made, could not be found or produced at the trial:—*Held*, that the petitioning creditor's debt was proved by evidence of the contents of such bill.

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The commissioners on that occasion examined the two bills, and adjudicated thereupon at the meeting for opening the commission; the bill for 70*l.* was laid upon the table before which the commissioners sat, amongst many other papers, and when the solicitor to the commission took the papers away, he missed that bill, which was never seen again, though searched for both at the place of meeting and at the petitioning creditor's place of abode, and at the solicitor's office. The petitioning creditor had indorsed the bill in blank, and had taken it up before the issuing of the commission. A verdict having passed for the plaintiff—

B. Andrews obtained a rule for a new trial, on the ground that the petitioning creditor's debt could not be established without the production of the bill. Against which cause was now shewn by—

Kelly, Gunning, and Palmer.—It was proved at the trial, that, up to the time of the commission and adjudication, there was a good petitioning creditor's debt. It is clear, that if there be a good petitioning creditor's debt at the time of issuing the commission, the commission will not be invalidated from the circumstance of such debt not being proved to have continued till the time of the trial. If the debt be destroyed before the trial, the commission would still be supported.

In *Ex parte Douthat (a)*, the bill drawn by the bankrupt was held to constitute a sufficient petitioning creditor's debt, though it appeared that, subsequently to the commission, it had been duly presented and paid by the acceptors. That case shews, that the only question is, whether there was a good petitioning creditor's debt at the time when the commission issued. If a subsequent destruction or payment of the debt should be held to invali-

(a) 4 B. & A. 67.

date the commission, very serious consequences would arise, as the commissioners, assignees, messenger, and every body acting under the commission would become trespassers *ab initio*.

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B. Andrews, in support of the rule — Without the production of the bill any evidence of its contents was inadmissible. In *Pierson v. Hutchinson (a)*, Lord *Ellenborough* expressly refused to receive evidence of the contents of a lost bill. It was decided, in *Hanaard v. Robinson (b)*, that the indorser cannot recover on a lost bill against the acceptor. Lord *Tenterden*, in delivering the judgment of the Court of *King's Bench* in that case, says, "the acceptor, paying the bill, has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer." It is quite clear, therefore, that the petitioning creditor could not have recovered upon this bill against the bankrupt. It lay upon the plaintiff to prove a good petitioning creditor's debt; and the rule is, that a petitioning creditor's debt must be established by the same evidence, which would enable him to recover in an action brought by him against his debtor. This rule was expressly laid down by Mr. Justice *Buller*, in *Abbott v. Plumbé (c)*.

LORD LYNDHURST, L. C. B.—The evidence may vary from circumstances which have interposed before the trial. Suppose a subscribing witness has died before the trial, proof of his handwriting would be admissible. The only question is, whether there was a good petitioning creditor's debt at the time when the commission issued.

BAYLEY, B.—In an action, you must shew that the de-

(a) 2 Camp. 211.

(b) 7 B. & C. 90.

(c) Dougl. 216.

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mand is recoverable. Now, in an action on a lost bill, you do shew that there was once a good cause of action in existence, but it also appears, that, through negligence, the right of recovering is lost. The debt is still a legal debt, but it is only recoverable in a Court of equity. When you have proved that a particular instrument is lost, you are let into parol evidence of its contents. Then, in the present case, it was proved that, at the time when the commission issued, there was a legal debt; that debt, it is true, could not be enforced in a Court of law at the time this action was tried, but here the party was not trying to enforce it. Perhaps, the circumstances might have given the bankrupt a right to apply to the Chancellor to supersede the commission, unless an adequate security were given; but both the bankrupt and the creditors may have an interest in supporting the commission. Such an interest cannot be defeated by the neglect of the petitioning creditor. The hardship is upon the bankrupt alone, for a *bond fide* holder might sue upon the bill, and might not be compelled to prove. The remedy of the bankrupt in such a case would be by an application to the Chancellor to supersede the commission, unless an indemnity were given. The debt was a legal debt, and the reason why it cannot be recovered in a Court of law is, that a Court of law cannot compel the plaintiff to give an indemnity; a Court of equity can (a).

GARROW, B., and BOLLAND, B., concurred; and the rule was

Discharged.

(a) *Vide Ex parte Greenway*, 6 Ves. 812.

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GOULD *v.* DAVIS.

JERVIS had obtained a rule on behalf of the attorney for the plaintiff, calling upon the plaintiff and defendant, and upon one *John Pollard*, to shew cause why they, or one of them, should not deliver to the plaintiff's attorney a certain bill of exchange, which had been signed by the defendant as a settlement of the action, and had been deposited in the hands of *Pollard*. It appeared, upon affidavit, that the action had been brought to recover 25*l.*, and that the cause stood for trial at the last *Monmouth Assizes*. The defendant called upon the plaintiff's attorney, just before the assizes, and told him, that he had a defence; but that, as the plaintiff was a beggar, he would give 23*l.* in discharge of the debt and costs. The plaintiff's attorney told the defendant that the costs would amount to that sum, but if the plaintiff would accept 5*l.* for his debt, he, the attorney, would not dissuade the plaintiff from such an arrangement; and he requested the defendant to inform the plaintiff of the defendant's offer. On the same day on which the above conversation took place, the defendant went to an inn near the plaintiff's residence, and sent for the plaintiff, and prevailed on him, without the privity or assent of the attorney, to put his mark to a paper containing as follows:—

Where plaintiff and defendant collusively settled an action, by the latter depositing a bill of exchange in the hands of a third party, the Court ordered the bill to be given up to the plaintiff's attorney.

“ *Mr. D. W. Davies, Dr. to John Gould.*

“ To the maintenance of *E.*, including law expenses, 24*l.*

“ Settled the above, by bill of two months after date; and

I also agree to withdraw all law proceedings against
Mr. Davies.

“ The mark ✕ of *John Gould.*

“ Witness, *John Pollard.*”

The bill was deposited in *Pollard's* hands, to remain till

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it became due. The attorney for the plaintiff swore that he believed that the arrangement was entered into purposely to deprive him of his costs, amounting to about 25*l.*, and that the defendant and *Pollard* well knew the circumstances of the plaintiff, who was quite unable to pay the costs.

John Evans shewed cause, and *Jervis* was heard in support of his rule. *Griffin v. Eyles* (a), *Welsh v. Hole* (b), *Turwin v. Gibson* (c), and *Chapman v. Haw* (d), were cited.

BAYLEY, B.—It seems to me that this rule ought to be made absolute. Wherever there is collusion between a plaintiff and a defendant, for the purpose of depriving the attorney of his costs, the attorney may proceed with the action for those costs. In the present case, the plaintiff and defendant settle the debt between themselves, the defendant being well aware of the claim of the attorney, and that the plaintiff was unable to pay the costs. The plaintiff has only a right to recover his debt; he has no right to get into his hands the costs which should come into the hands of the attorney. The defendant, by giving this security, lent himself to the plaintiff, and the plaintiff being a beggar, in what a situation would the attorney be placed by the arrangement between these parties, if the Court were not to interfere in the manner prayed for by this rule?

The present is not the case of a payment of money, but of giving a security, which includes the costs and a part of the debt. The security being given, who ought to have the benefit of it? If the cause went on, the attorney would have had a lien on the fruits of the action. Here, instead of a judgment, a security is obtained—an undertaking by the defendant to pay at some future day. Part of this is clearly in satisfaction of the claim of the plaintiff's at-

(a) 1 H. B. 122.

(b) Dougl. 237.

(c) 3 Atk. 720.

(d) 1 Taunt. 341.

torney. It seems to me, therefore, that the plaintiff's attorney has a right to the possession of this document, for the purpose of first paying himself, and as a trustee accountable to the plaintiff for the residue. This will be the right and just course as between all the parties. The plaintiff has agreed that the defendant should be discharged, on payment of 25*l*. Our present decision will satisfy that agreement. The plaintiff will receive it without any deduction except the costs, which he is liable to pay to his attorney. I am therefore of opinion that this rule should be made absolute.

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GARROW, B.—The party upon whom this rule will operate has no right to complain. He is substantially in the same situation in which he put himself by the agreement.

BOLLAND, B.—This case is not distinguishable in principle from that cited from *Atkins*.

Rule absolute.

EXCHEQUER CHAMBER.

SOLARTE v. PALMER.

[In Error from the *King's Bench*].

ASSUMPSIT against the indorsers of a bill of exchange.

At the trial, before Lord *Tenterden*, C. J., at the *London* Sittings after *Hilary* Term, 1828, the only question

A letter to the indorser of a bill of exchange from the attorneys of the holder, stating, that "a bill for 683*l*,"

drawn by *A.* upon *B.*, and bearing your indorsement, has been put into our hands by *C.*, with directions to take legal measures for the recovery thereof, unless immediately paid," is not a sufficient notice of dishonour in an action by *C.*, the holder, against the indorser.

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was as to the sufficiency of the notice of dishonour of the bill of exchange. The learned Judge ruled, that the notice was insufficient, upon which a bill of exceptions was tendered on behalf of the plaintiffs, and a verdict passed for the defendants. A writ of error was brought on the judgment, which was entered for the defendants. The part of the bill of exceptions upon which the argument and judgment proceeded was as follows:—

“ And thereupon the counsel for the said plaintiffs did give in evidence, and prove that the said bill was returned to the said plaintiffs for such non-payment on the 16th day of the said *December*; and the said counsel for the said plaintiffs did further give in evidence and prove, that the said plaintiffs did, on the 17th day of *December* aforesaid, cause to be written by Messrs. *J. and S. Pearce*, the attorneys at law for and on behalf of the said plaintiffs, the following letter to the said defendants:—

“ 17th *December*, 1825.

“ Gentlemen—A bill for 683*l.*, drawn by Mr. *Joseph Keats* upon Messrs. *Daniel, Jones, & Co.*, and bearing your indorsement, has been put into our hands by the assignees of Mr. *J. R. de Alsedo* (the plaintiffs), with directions to take legal measures for the recovery thereof, unless immediately paid to—Gentlemen, your very obedient servants,

J. and S. Pearce.

(Addressed)

Messrs. *Palmer & Bouch.*”

“ Which said letter was, on the said 17th day of *December*, by the directions and on the behalf of the said plaintiffs, sent to and received by the said defendants; and the said Chief Justice did then and there declare and deliver his opinion to the Jury aforesaid, that the aforesaid letter was not a sufficient notice of the dishonour and non-pay-

ment of the said bill of exchange to entitle the said plaintiffs to maintain and support the said action against the said defendants; and that upon the said evidence the said Jury ought to find a verdict for the said defendants; and with that direction left the same to the said Jury."

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R. V. Richards, for the plaintiffs.—The object of notice of dishonour is, to put parties, who are collaterally liable, upon their guard, so that they may have the opportunity of withdrawing their funds, and also to give them information that the holders look to them for payment. The notice in the present case is sufficient for both these purposes, and there is no authority to shew that any set form of words is necessary. The rule on this subject is laid down by Mr. Justice *Buller* in *Tindal v. Brown* (a)—"The purpose of giving notice is not merely that the indorser should know that the note is not paid, for he is chargeable only in a secondary degree; but, to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so." "Though there is no prescribed form of this kind of notice, yet it must import that the holder considers the indorser as liable, and expects payment from him, that he may have his remedy over by an early application; then it becomes his business to take up the note." Applying this rule to the present case, it cannot be doubted that the holder intended to look to the defendants for payment, and gave them notice that he did so. If the notice in this case had contained the word *dishonoured*, it would have been clearly sufficient; but such word would really give no additional information.

There would be great danger and difficulty in having recourse to any other rule than that laid down in *Tindal v. Brown*, which is adopted into all the *English* treatises. In *Bayley on Bills* (b), the rule is thus laid down: "The

(a) 1 Term Rep. 170.

(b) 4th Edit. 206.

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notice must come from the holder or some party entitled to call for payment or reimbursement; and though there is no prescribed form for it, it ought to import that the person to whom it is given is considered liable, and that payment from him is expected."

If a different rule were to be adopted, and the holder were to be tied down to any particular form of words, the word dishonoured might be held insufficient, and it would be said that the notice should shew by whom the bill had been dishonoured. If the plain rule laid down in *Tindal v. Brown* is once departed from, a notice, to be safe, must have all the particularity of a declaration. This notice does in effect contain every requisite, except the word dishonoured. The words "instructions to take legal measures" must mean against the party to whom the notice was sent. The case of *Hartley v. Case (a)* has no resemblance to the present. In that case the notice was "I am desired to apply, &c. upon a draft drawn by Mr. Case on Mr. Case," and it did not at all appear which Mr. Case had drawn and which dishonoured the bill. There might have been other bills so drawn, and the notice should at least have shewn in what capacity the party was liable.

Whateley, contra.—It is of great importance that the notice should be clear and intelligible. It ought to convey information as to what the bill is, that payment has been refused by the acceptor, and that the holder looks to the party applied to for the payment, on the ground that the bill has been dishonoured. The averments in the declaration shew what it is necessary that the party should have notice of. Suppose that, instead of the usual general averment of notice, this letter had been set out on the record, it would clearly have been insufficient. *Tindal v. Brown* only

(a) 4 B. & C. 339; 6 D. & R. 505.

shews, that the ingredients there mentioned are necessary, but it does not shew that nothing more is necessary. If the notice in the present case be compared with that in *Hartley v. Case*, it will be found that the latter is much more explicit. In *Hartley v. Case* there was a demand of payment, a statement that the sum was due to the plaintiff, and a threat of legal proceedings. In the present case the notice did not give the date of the bill, nor was there any thing to shew that it was due, which was stated in the notice in *Hartley v. Case*. Unless *Hartley v. Case* be overruled, the judgment in the present case must be for the defendants.

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Cur. adv. vult.

The judgment of the Court was now delivered by *Tindal, C. J.*—

The question in this case is, whether the direction of Lord *Tenterden* to the Jury, that the letter given in evidence at the trial, and set out upon the bill of exceptions, was not sufficient notice of the dishonour and non-payment of the bill, and that, upon such evidence, the Jury ought to find a verdict for the defendants—was a proper direction or not. And we are of opinion that the direction was proper, and that the judgment which has been given for the defendants must be affirmed.

The notice of dishonour, which is commonly substituted in this country in the place of a formal protest, such formal protest being essential in other countries to enable the plaintiff to recover (a), most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted; but it should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that

(a) Pothier, *Traité du Contrat de Change*, Part I. c. 5, s. 2, Art. I. s. 5.

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the bill has been dishonoured, and that the holder looks to him for payment of the amount.

The allegation in the declaration is, that the bill has been presented to the acceptor, who has refused payment, whereof the defendant has had notice. Consequently, to satisfy that allegation, though no express form of words is necessary, the notice should convey an intimation to the party to whom it is addressed, that the bill is in fact dishonoured. Now, looking at the notice, we think no such intimation is conveyed in terms, or is to be necessarily inferred from its contents. Besides, it is perfectly consistent with this notice, that the bill has never been presented at all, and that the plaintiff means to rely on some legal excuse for the non-presentment. The present case is stronger against the sufficiency of the notice than that of *Hartley v. Case (a)*, where there was at least an allegation that the bill had become due, which is not found here. This letter may not improbably have been written with a different intent than that of giving notice of the dishonour to the indorser, and may have been information that an action was about to be brought by the attorney, taking it for granted that the notice of the bill's dishonour had been given in the ordinary way before the bill was put into his hands for the purpose of suing thereon. At all events, however intended, it appears to us not to amount to such notice. We therefore think the judgment ought to be affirmed.

Judgment affirmed.

(a) 4 B. & C. 339; 6 D. & R. 505.

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LEATHLY v. HUNTER.

[In Error from the Court of *King's Bench*.]

DECLARATION in *assumpsit* on a policy of insurance, lost or not lost, at and from *Sincapore, Penang, Malacca, and Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*, or to any port or ports in the *United Netherlands*, or to *Altona, or Hamburg*, all or any, with leave to touch, stay, and trade, at all or any ports and places whatsoever and wheresoever in the *East Indies, Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good Hope*, in port or at sea, at all times, and in all places, and until safely arrived and landed at the ship's final port or place of discharge, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the *Albion, Bolivar, Java Packet, and Blora*, all or any, whereof was master, under God, for that voyage ———, or whosoever else should go for master in the said ship, or by whatsoever other name or names the same ship or the master thereof was or should be named or called, beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ships as above, with leave to call at or off any ports or places in *Great Britain*, and wait for orders upon the said ship, &c., including the risque in craft of every denomination to and from the ship or ships, and so should continue and endure during her

A policy of insurance was effected on goods by four specified ships, all or any of them, at and from *Sincapore, Penang, Malacca, and Batavia*, all or any, to the ships' port or ports of discharge in *Great Britain*, or to any port or ports in the *United Netherlands*, or to *Altona or Hamburg*, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the *East Indies, Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good Hope*, in port or at sea, at all times and in all places, and until safely arrived, &c., and with leave for the ship in that voyage to proceed and sail to and touch and stay at any ports or places what-

soever and wheresoever, in any direction and for any purpose, necessary or otherwise, particularly *S., P., M., B.*, the *Cape of Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation from, and without prejudice to, the assurance. The vessel, on goods by which the interest was afterwards declared to be, took on board part of her cargo at *Batavia*, and proceeded to *Sourabaya*, four hundred miles to the eastward of *B.*, and out of the course of her voyage to *Europe*, and out of her course to any of the places named in the policy. At *S.* she completed her cargo, sailed back to *B.*, and thence sailed on her voyage to a port in *Europe* within the policy:—*Held*, that the voyage to *S.* was a voyage within the policy, that it was no deviation, and that *S.* was a loading port within the policy.

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abode there, upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever, should be arrived at as aforesaid, upon the said ship, &c., until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes, until the same were there discharged and safely landed; and it should be lawful for the said ship, &c., in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose necessary or otherwise, particularly *Singapore, Penang, Malacca, Batavia, the Cape of Good Hope, and Saint Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation from, and without prejudice to that insurance. And the policy was, by a memorandum therein, declared to be on goods, as interest might appear, with leave to declare the same thereafter.

Averment—That, after the making of the said policy of insurance, to wit &c., the interest on the said goods and merchandizes so intended to be insured by the said policy of insurance, as aforesaid, was duly declared to be all in the *Java* packet, on coffee.

The declaration then stated, that the defendant became an insurer for 300*l.*, at a premium of 6*l.* 6*s.* per cent. and then stated the promise of the defendant in the usual manner; it then proceeded to aver that afterwards, to wit, on &c., to wit, at *Batavia*, in the said policy of insurance mentioned, divers goods and merchandizes, to wit, ten thousand piculs of coffee, of great value, to wit, of the value of ten thousand pounds, had been and were shipped and loaded in and on board the said ship or vessel, called the *Java Packet*, in the said policy of insurance mentioned to be carried and conveyed therein on the said voyage in the said policy of insurance mentioned, to wit, towards and into *Antwerp*, being a port

in the United *Netherlands* therein mentioned; and that also afterwards, to wit, on the 14th day of *October*, 1826, aforesaid, to wit, at *Sourabaya*, being a certain port or place which the said ship or vessel proceeded and sailed to, and touched and stayed at, under and by virtue of the said policy of insurance, to take on board goods, divers other goods and merchandizes, to wit, ten thousand piculs of coffee, and ten thousand bags of coffee of great value, had been and were shipped and loaded in and on board the said ship or vessel, to be carried and conveyed therein to *Antwerp*, as aforesaid, and that the said plaintiffs were then and there, and from thence continually afterwards, until, and at the time of the loss after mentioned, interested in the said goods and merchandizes so shipped and loaded as aforesaid, to a large value and amount, to wit, to the value and amount of all the monies by them ever insured, or caused to be insured thereon, to wit, at &c.; and that, afterwards, to wit &c., the said ship or vessel, called the *Java Packet*, departed and set sail from *Batavia* aforesaid, on her said voyage towards *Antwerp* aforesaid; and that afterwards, and whilst the said ship or vessel was proceeding on her said voyage, with the said goods and merchandizes so on board thereof as aforesaid, and before her arrival at *Antwerp* aforesaid, to wit, on &c., (the declaration then averred a loss by perils of the sea).

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The declaration contained several other counts on the policy and the money counts. Plea—General issue.

At the trial, before Lord *Tenterden*, C. J., at the *London* Sittings after *Hilary* Term, 1829, a special verdict was found, which stated the following facts:—That the policy of insurance in the first count of the declaration mentioned was duly effected, &c., and was subscribed by the said defendant for the sum of 300*l.*, in manner and form in the said declaration mentioned; and that the interest intended to be insured by the said policy was duly declared to

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the said defendant below, to be all in the *Java Packet*, on coffee, in manner and form in the first count of the said declaration mentioned; and that the said ship or vessel being at *Batavia*, in the said policy mentioned, a certain quantity of coffee, of the value of 923*l.* 8*s.* 6*d.*, and no more, was there loaded in and on board the said ship or vessel, by the said plaintiffs, with the intention that the said coffee should be carried in the said ship or vessel to *Antwerp*, in the said first count mentioned; and that *Batavia* is a port in the island of *Java*, one of the islands in the *East Indies*; and that the said ship having taken in the said coffee at *Batavia*, in the prosecution of the adventure, proceeded from thence with the said coffee on board her to *Sourabaya*, which is another port in the said island of *Java*, and the said plaintiffs there loaded a certain other quantity of coffee, of the value of 5368*l.* 16*s.* 6*d.*, on board the said ship or vessel, with the intention that the same should be carried in the said ship or vessel to *Antwerp* aforesaid; and that the said ship or vessel, in the course of the adventure, returned from the said port of *Sourabaya* to the said port of *Batavia*, with the said coffee so shipped on board her at *Batavia* and *Sourabaya* as aforesaid; and that the said ship or vessel afterwards sailed therewith from the said port of *Batavia*, for *Antwerp* aforesaid; and that *Sourabaya*, to which place the said ship proceeded from *Batavia*, and where she took in coffee as aforesaid, is not in the direct course from *Batavia*, *Singapore*, *Penang*, or *Malacca*, to *Europe*, nor in the direct course from any one of those four places, *Singapore*, *Penang*, *Malacca*, and *Batavia*, to any other of those four places, but the said port of *Sourabaya* is directly out of the course from each of the said four places to *Europe*, and from each of the said four places to any other of them, and is distant from *Batavia* four hundred miles eastward; and that *Singapore*, *Penang*, *Malacca*, and *Batavia*, are not, according to the order in which the

said four places are mentioned in the policy, in the direct course of a voyage therefrom to *Europe*, but that the direct course of a voyage from the said four places to *Europe* is according to the following order, *viz. Penang, Malacca, Sincapore, and Batavia*, and that any port or place in *Persia* is more than one thousand miles out of the course from any one of the said four places to *Europe*; and that the whole of the said coffee was the property of the said plaintiffs; and that the said plaintiffs were interested therein, in manner and form in the said first count of the said declaration mentioned; and that the said ship or vessel, whilst she was proceeding from *Batavia* aforesaid towards *Antwerp* aforesaid in the said voyage, with the said coffee on board thereof, and before her arrival at the said port of *Antwerp*, was wholly lost by perils of the sea, and thereby the said coffee was wholly lost to the said plaintiffs.

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The Court of *King's Bench* gave judgment for the plaintiffs below, for the amount of the loss on the coffee shipped both at *Batavia* and *Sourabaya*. Upon this judgment a writ of error was brought, which was argued by *Maule* for the plaintiffs in error, and by *Joshua Evans* for the defendants in error (a).

The Court took time to advise, and the judgment was now delivered by *Tindal*, C. J.—

In this case, in which judgment has been given for the plaintiffs in the original action, it appears to be unnecessary to recapitulate the declaration or the facts found by the special verdict. It will be sufficient to make such reference to them as will be necessary to explain the grounds of the judgment now given by the Court. The writ of

(a) The points made in argument were so very fully stated and considered by the Court in their judgment, that it would be superfluous to state them here.

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error was brought by the defendant below, and the objections which have been taken to the judgment of the Court of *King's Bench*, and which are relied on in argument by the Counsel for the plaintiff in error, were in substance three, *vis.* *First*, that the ship never sailed on the voyage described in the declaration, or, in other words, that there was a misdescription of the voyage.

Secondly, that, upon the facts stated in the special verdict, the sailing from *Sourabaya* to *Batavia* and back, was a deviation; and

Thirdly, that, at all events, the goods shipped at *Sourabaya* are not covered by the policy.

The first objection urged is, that the voyage for which the ship was insured, was a voyage from *Singapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to any port in the *Netherlands*; that the ship sailed with part of her cargo on board from *Batavia* to *Sourabaya*, a port 400 miles to the eastward, where she loaded other part of her cargo, and then returned to *Batavia*, and thence set sail to *Antwerp*; and that this was not the voyage insured; and that, the ship sailing on a different voyage from that described in the policy, the underwriters are altogether discharged.

In order to ascertain the validity of this objection, it will be necessary to advert to the terms in which the voyage itself is described in the policy, and the leaves or licences for which the assured has stipulated, and also to advert to those facts stated in the special verdict which bear on this part of the question.

Now, the voyage is described in the policy "at and from *Singapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*, or to any port or ports in the *United Netherlands*, or to *Altona* or *Hamburg*, all or any, with leave to touch, stay, and trade at all or any ports or places, whatsoever and wheresoever, in the *East Indies*, *Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good*

Hope, in port or at sea, at all times and in all places, and until safely arrived and landed at the ship's final port or place of discharge."

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The adventure is then declared by the policy to be on goods, in the good ship or vessel called the *Albion*, *Bolivar*, *Java Packet*, and *Blora*, all or any; and the commencement of the adventure is then stated to be upon the said goods and merchandizes, from the loading thereof on board the said ships as above.

After this is inserted a second or further clause of leave or licence, in these terms: "And it should be lawful for the said ship in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly *Sincapore*, *Penang*, *Malacca*, *Batavia*, the *Cape of Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation from, and without prejudice to the assurance." This policy was afterwards declared to be all on the *Java Packet*, in coffee. Now, looking at the terms in which this policy is effected, and construing it in the plain, ordinary, and popular sense in which these terms are to be understood, there being no peculiar sense, as far as we are aware, which the words have acquired distinct from their popular sense, we think the voyage in question is a voyage intended by the parties to be, and is in fact covered by the description of the voyage contained in the policy.

The voyage performed by the ship is described in the special verdict thus—"That the ship being at *Batavia*, a certain quantity of coffee, of the value &c., was there loaded in and on board the said ship or vessel by the assured, with the intention that the said coffee should be conveyed in the said ship to *Antwerp*; and that *Batavia* is a port in the island of *Java*, one of the islands in the *East Indies*; and that the said ship having taken in the said coffee at

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Batavia, in the prosecution of the said adventure, proceeded from thence with the same coffee on board her to *Sourabaya*, which is another port in the island of *Java*; and that the assured there loaded a certain other quantity of coffee of the value &c., on board the said ship, with the intention that the same should be carried in the said ship to *Antwerp*, aforesaid."

The special verdict afterwards states, "That the said ship, in the course of the adventure, returned from the said port of *Sourabaya* to the said port of *Batavia*, with the said coffee so shipped on board her at *Batavia* and at *Sourabaya* aforesaid; and that the said ship afterwards sailed therewith from the port of *Batavia* for *Antwerp*, aforesaid; and that *Sourabaya*, to which place the said ship proceeded from *Batavia*, and where she took in coffee as aforesaid, is not in the direct course from *Batavia*, *Singapore*, *Penang*, or *Malacca*, to *Europe*, nor in the direct course from any one of those four places, *Singapore*, *Penang*, *Malacca*, or *Batavia*, to any other of those four places; but the said port of *Sourabaya* is directly out of the course from each of the said four places to *Europe*, and from each of the said four places to any other of them, and is distant from *Batavia* 400 miles eastward; and that *Singapore*, *Penang*, *Malacca*, and *Batavia*, are not, according to the order in which the said four places are mentioned in the policy, in the said course of a voyage therefrom to *Europe*; but that the direct course of a voyage from the said four places to *Europe* is according to the following order, *viz.* *Penang*, *Malacca*, *Singapore*, *Batavia*; and that any port or place in *Persia* is more than 1000 miles out of the course from any of the said four places to *Europe*."

The underwriters contend, that when the ship sailed from *Batavia*, after the risk had commenced, to *Sourabaya*, to take in a further cargo, and then sailed back to *Batavia*, she sailed on a voyage not within the policy, or

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within either of the leaves or licences contained therein. But, independently of the large and general words used in the description of the voyage, and the very extended powers given by the policy, the situation of the assured, and the circumstances under which it was effected, as they must be inferred from the policy itself, make it probable that a contract of the most open and comprehensive kind was intended to be effected. This was an insurance on goods, not on ships. At the time the policy was effected, the assured was uncertain from what port or ports of the *East Indies* or *Persia* his cargo would be shipped by his agents—whether all at one place, or part at one and part at another. He was further uncertain by what ship or ships, out of four which are named in the policy, his cargo would be carried—from what port or ports, out of four which are enumerated, such ship or ships would sail. He could neither foresee into what ports or places, nor for what purposes, the owners of the ships might send them, nor could he control such directions; and therefore, he frames a description of the voyage in such comprehensive terms as may comprise a loading of the cargo, either at one port, or at various ports and places in the *East Indies*; and powers and licences are also inserted in the policy, so as to meet almost every possible contingency of the destination or employment of the ships, without endangering his right to recover for a loss upon the goods, either on the grounds of misdescription of the voyage, or of any deviation. Looking at the policy with this view, we think the words of the policy are large enough to carry such intention into effect, and that the sailing from *Batavia* with part of the cargo to *Sourabaya*, and taking in other part of the cargo there, and then returning from *Sourabaya*, by the way of *Batavia*, to *Europe*, was a voyage within the contemplation of and protected by the policy. It is argued, on the part of the underwriters, that if the clause first inserted is taken alone, the meaning of the words

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“touch, stay, and trade at all or any ports whatsoever in the *East Indies*,” can only mean such ports and places as the ship may touch at in the usual course of a voyage from one or other of the four enumerated places to *Europe*; that the leave to stay and trade implies, that the ship is lawfully at the place where such trading and staying is to take place, that is, some port or place in the course of the voyage. But that this cannot be the meaning of the present policy appears clear from the remainder of the clause, *viz.* “any port or places whatsoever in the *East Indies*, *Persia*, or elsewhere.” Now, as the special verdict has found expressly, that any port or place in *Persia* is more than one thousand miles out of the course from any of the said places to *Europe*, it follows, that the trading cannot be intended to be confined to such ports or places only as the ship touches at in the course of such voyage; in the same manner as in the case of *Metcalfe v. Parry* (a), where the clause was, “with liberty to call at all or any of the *West India* islands, *Jamaica* included,” it was held, that the insertion of *Jamaica*, which was five hundred miles out of the usual course, shewed the intention to be, that the ship might stop at any of the islands, though out of the course of the usual voyage.

Again, taking up the question on the second clause of licence, the words used are, taken altogether, of a meaning equally general with those in the first, *viz.* “it should be lawful for the said ship in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever or wheresoever, in any direction or for any purpose.” It is contended, that the generality of this licence is restrained by the words “in that voyage.” But, upon that construction, what sense can be given to the words “in any direction?”—words that are irreconcilable with touching for the purpose of trade in the onward course of the voy-

(a) 4 Camp. 123.

age only; and the insertion of these words in the policy distinguishes the case from that of *Hogg v. Horner* (a), which was cited on the part of the plaintiff in error. Upon the whole, therefore, we think the shipping part of the cargo at *Batavia*, and thence proceeding to *Sourabaya*, and shipping other part of the cargo there, and thence sailing back to *Batavia*, and thence, with the cargo, to *Antwerp*, was a trading voyage from *Batavia* to *Antwerp*, by the way of *Sourabaya*, within the intention of the parties, as expressed in the policy and the two several clauses of licence contained therein.

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Having, therefore, fully considered this, the first objection made, it becomes scarcely necessary to do more than advert to the two which remain; for, if the sailing from *Batavia* to *Sourabaya*, and back to *Batavia*, and thence to *Europe*, is a voyage described in the policy, it follows immediately, that it cannot be treated as a deviation. Indeed, as one of the places to which the ship might go on the voyage is a port in *Persia*, and as the special verdict does not find that *Sourabaya* is out of the course to *Persia*, we should not be justified, upon this more restrained ground, in considering this as a deviation from the voyage insured.

As to the third point, that the goods loaded at *Sourabaya* are not covered by the policy, the question is, whether *Sourabaya* is a loading port within the meaning of the policy? Besides referring to the opinion we have already expressed on the first objection, which also involves this question, we think the two cases of *Violet v. Allnut* (b), and *Barclay v. Sterling* (c), go the full length of establishing, that, under the usual clause in a policy, "with liberty to touch at a port for any purpose whatever," is included a liberty to touch for the purpose of taking on board part of the cargo covered by the policy, after the policy

(a) *Park, Insurance*, 444.

(b) 3 Taunt. 419.

(c) 5 M. & S. 6.

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had attached on part taken in at the loading port. And in this case, the leave is not confined to touching and staying, but extends expressly to taking on board, discharging, re-loading, and exchanging goods.

Upon the whole, therefore, we think the plaintiff below entitled to recover the loss upon the whole of the cargo, both that loaded at *Batavia* and that loaded at *Sourabaya*; and we therefore think that the judgment given by the Court of *King's Bench* should be affirmed.

Judgment affirmed.

IN THE HOUSE OF LORDS.

Revenue.

REX v. WINSTANLEY.

[In Error from the *Exchequer Chamber*.]

A sale by auction by assignees of a bankrupt, of the absolute interest in fee of an estate in mortgage, is not liable to auction duty.

UPON a *scire facias* upon an auctioneer's bond, the question raised by demurrer was, whether a sale by auction by the assignees of a bankrupt, of the absolute interest in fee of an estate belonging to the bankrupt, which was mortgaged, was liable to the auction duty.

The Court of *Exchequer*, overruling the case of *The King v. Abbott* (a), decided that auction duty was not payable (b). Upon a writ of error, the Chief Justices differed in opinion, and the judgment was affirmed (c). A writ of error was afterwards brought in the House of Lords. The Judges were summoned, and the case was argued by the *Attorney-General* and the *Solicitor-General*,

(a) 3 Price, 178.

(b) 2 Y. & J. 124.

(c) 3 Y. & J. 126.

for the Crown, and by Sir *E. B. Sugden* and *M^cArthur*, for the defendant.

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LORD TENTERDEN.—My Lords, this case, which has been argued with very great learning and ability on both sides, comes before your Lordships upon a decision of the Court of *Exchequer*, having, in the intermediate stage, been before the Court of *Exchequer Chamber*. Upon the occasion when it was heard before the noble and learned Lord now present and myself, we thought it a case fit to be submitted to the consideration of your Lordships, for it cannot be denied that the case now before your Lordships does, in effect, overrule a solemn decision of the Court of *Exchequer*, in a case very much the same upon principle, although distinguishable from it in some respects. Under such circumstances, I should humbly propose to your Lordships, that certain questions should be put to the learned Judges whose assistance the House has had during the present argument, and that we should receive the benefit of their answers to those questions, before we come to any decision.

The case has been argued principally as a case of property, mortgaged by a trader, who became bankrupt, which property was ultimately put up to sale by his assignees, with the concurrence of the mortgagor. The case is not, however, precisely of that character, because it appears that, after Mr. *Clayton*, who was the original owner of the estate, had conveyed his estates to different persons by way of mortgage, to secure different sums of money, the equity of redemption remaining in him, he conveyed the whole, that is, his equity of redemption in the whole, to certain trustees, with very large powers, and from those powers, I should judge that it was considered of more value than it really was; because, among other powers vested in the trustees, is a power of raising further sums, whether by mortgage or by sale of leases,

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and so on; the trust, ultimately, being to pay off whatever they should borrow, as well as the further incumbrances. The sale in question was a sale by order of the assignees, with the concurrence of those trustees. Now, for the purpose of deciding this case, I shall submit to your Lordships, that it will be proper to put two different questions to the learned Judges, one of them applicable to the general principle upon which the question has been argued; and another, applicable to the especial facts that appear upon the record in this case. The questions I should propose would be these: *First*, whether, if a trader, having mortgaged his land as security for payment of a debt, afterwards become bankrupt, and the whole interest in the land is sold by auction, by order of the assignees of the bankrupt, and with the concurrence of the mortgagee, duty on the sale is payable to his Majesty on the whole, or any or what part of the sum produced by the sale. *Secondly*, whether, if a trader, after such mortgage, conveys the land to trustees in trust, to raise further sums, and to sell for the payment of former and new incumbrances, and the land is sold by auction by order of the assignees, with the concurrence of the trustees, it not appearing that any further sum was raised by the trustees, or any new incumbrance created by them, or that the mortgagee was informed of the sale, duty is payable to his Majesty on the whole or any part of the sum produced by the sale.

(The learned Judges consulted together.)

BAYLEY, B.—My Lords, I believe, if any doubt had been entertained by any of the Judges, upon the questions submitted by your Lordships to their consideration, or if I had understood that any doubt, which had previously existed elsewhere, had still continued, I should have requested of your Lordships time for delivering the opin-

ion of the Judges; but as I have reason to believe that no doubt exists in any quarter, I shall at once state to your Lordships, the principles upon which the opinion of the Judges is founded.

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The questions depend upon the true construction to be put upon the statutes 19 *Geo.* 3, c. 56, s. 15, and 6 *Geo.* 4, c. 16, s. 98. But, before I enter into the language of either of those statutes, it is desirable that I should point out to the House the situation in which the mortgagor and mortgagee stand.

The mortgagee is a general creditor of the mortgagor, he has a right to proceed against the general personal property of the mortgagor, or against the person of the mortgagor, as a collateral security for the payment of his debt, but his proper character is that of a creditor, and the securities he holds are merely securities to enable him to obtain payment of his debt; notwithstanding the mortgage and the security the land mortgaged gives, he has a right to proceed so as to obtain judgment and execution against the general property of the mortgagor, or to proceed against the person of the mortgagor.

The provision in the statute 19 *Geo.* 3, exempts certain cases from the general operation of the duty imposed by that act, and the cases which the Legislature thought fit to exempt, are to be found in the 15th section of that statute. The first exemption applies to any estate, goods, or chattels sold by auction, or under the authority of any Sheriff, or under-sheriff, for the benefit of creditors, in execution of any judgment had or obtained: and this provision appears to me to throw light upon the subsequent exemption in case of bankruptcy; and to shew that it was the intention of the Legislature to exempt from the auction duty those cases in which the property was sold, not by the voluntary act of the owner, but where the sale was enforced under a judgment or the authority of the law. The next exemption is, any

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estate or effects of bankrupts, sold by order of the assignee or assignees under any commission of bankruptcy; that also is a sale not by the voluntary act of the owner of such estate or effects, but a sale which is forced upon him in consequence of the insolvent condition in which he is placed.

The question then is, upon the sale of an estate subject to a mortgage, whether, within the meaning of this provision, the whole of that estate is to be considered as the property of the bankrupt, or whether it is a mixed sale of the property of the bankrupt, and also of the mortgagee; and we are of opinion, that, upon the true construction of this act, the whole is to be considered as being the estate of the bankrupt. By the sale, a fund is raised, by which the mortgage debt is discharged, the mortgagee ceases to be a creditor, and all right in the mortgagee to proceed against the general estate of the bankrupt, or against the person of the bankrupt, is destroyed. The whole money which is raised, is raised for the benefit of the bankrupt, and to discharge the bankrupt's debt, and the whole duty to be paid is to be paid out of the bankrupt's estate.

I do not advert to the 43 *Geo. 3*, and 45 *Geo. 3*, which, instead of the words "estate or effects," used the words "interest in;" because I think the different expressions in the different acts mean one and the same thing. The statute of the 6 *Geo. 4*, c. 16, s. 98, only varies from the 19 *Geo. 3*, by omitting the words "by order of the assignee or assignees;" and whatever construction was before to have been put upon the 19 *Geo. 3*, appears to us to be the construction to be put upon the 6 *Geo. 4*.

That clause contains two provisions, one applicable to commissions of bankrupt, and to deeds, conveyances, assignments, surrenders, admissions, or assurances relating to the bankrupt's estate, which deeds, &c., are exempt from all duties; and, secondly, it relates to all sales of any real or personal estate of any bankrupt or bankrupts, so as

to exempt such sales from the payment of auction duty. Those provisions are distinct, and the construction of the latter does not appear to us to be materially influenced by the former.

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Upon the whole, upon the ground that the sale is a sale not by the owner at the instance of the mortgagee, but by the persons who stand in the place of the bankrupt, inasmuch as the whole money to be raised is applicable to the purposes of the bankrupt, to pay the debts of the bankrupt, and to exonerate the rest of his estate and his person from all claim in respect of the mortgage debt; and inasmuch as the whole duty is to be raised out of the estate of the bankrupt, and to be paid by the estate of the bankrupt, if payable at all—We are of opinion, that the whole which is sold is properly to be considered as the estate of the bankrupt, and that the principle of the exemption, which was to relieve the bankrupt from the payment of duty, applies to this case. Our opinion, therefore, is, upon both the questions submitted to our consideration, that no duty is payable.

LORD WYNFORD.—My Lords, I had the honour of being a member of the Court below when this case came under the consideration of that Court; and I have no hesitation in stating, that I then thought, that the opinion now expressed by one of the learned Judges to-day, as the opinion of all the learned Judges present, was not correct. My view of the case had altered before I heard the opinion of the learned Judge; but if I had remained in my former opinion, I should have done as I did upon one occasion before, when I had the misfortune to differ from all the learned Judges: I should have advised your Lordships to act upon their judgment; for it would introduce a wretched state of uncertainty in the law of this country, if you were not to act upon that which is the highest authority of the law in *Westminster Hall*, but to follow the opinions of

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individual peers. I am happy, however, now to state, that, after having given the fullest consideration to this question, I am quite convinced that the learned Judges were right in the opinion they gave, and that I at first took an erroneous view of this subject.

My Lords, the puzzle, (for so I must call it), has arisen from the term "estate." The words of the act of Parliament are "the estate of the bankrupt." That at first induced me to think, that such interest as did not belong to the bankrupt could not be considered as the bankrupt's estate; but I am convinced by the argument, that this is entirely the estate of the bankrupt. It is the estate of the bankrupt, loaded with the debt of the creditor; but the whole estate is in the bankrupt. It is perfectly true that the creditor has that species of power, with reference to the estate, that, for the purpose of securing his debt, which is all that he has, he may reduce that estate into his possession; but it is for no other purpose than that of securing the payment of his debt; and beyond that, every interest in the estate is undoubtedly the interest of the bankrupt or his creditors. My Lords, that being the case, it appears to me, that when the sale takes place by order of the commissioners of an estate circumstanced as this is, that is, charged with a debt, it is a sale in which the party is entitled to be relieved under this act of Parliament.

My Lords, there is no sort of injustice in this, though I am agreed that your Lordships are not sitting judicially, to be led away by the equities of any case. Your Lordships are, in the situation in which you are placed now, to administer the law, whatever it may be; and if that law be productive of injustice, in your legislative character your Lordships may alter it. But there is no injustice in this decision; on the contrary, in every view of the case, it obtains the perfect equity of the case. In the first place, suppose the fund is not sufficient to pay the debt, bywhom

is the auction duty paid? If there be enough to pay the mortgage creditor, and not enough to pay every body else, it must come out of the bankrupt's fund, to the loss of the creditors, who have suffered enough already in not having their debts paid. Suppose, in the next place, there is nothing left to the creditors of the bankrupt, but that the whole is swallowed up by the mortgagee; in that case, in point of equity the mortgagee has a right to say, "It is unjust to require me to pay the duty;" and therefore, though perhaps that case would not come strictly within the terms of the acts of Parliament, it would come within the principle upon which the Legislature meant to give relief. Suppose a third case—that the mortgage was paid off; that all the bankrupt's creditors were paid off; and that some surplus remained for the poor miserable man whose property had been thus compulsorily sold: in that case, it would be inconsistent with justice, that a sale, which he was forced to make for the purpose of making a distribution of his property among his creditors, should be charged with the payment of duty. It seems to me, that that would be a case that would call upon the Legislature to say, that no duty should be paid; that it was hardship enough upon a man, that his property should be all broken to pieces in this way, without being called upon to pay the duty upon that sale which was necessary for the purpose of enabling him to pay his debts.

There is one other principle upon which I will put this case, and upon which I was in the habit of putting cases when I had the honour of sitting in the Court below.—In all revenue cases, let the officers of Government take care that the Legislature is made to speak plain and intelligible language. If the Legislature is not made to speak plain and intelligible language, let not individuals suffer, but let the public. I am bound to say, if there is any doubt about these words, the benefit of that doubt should be given to the subject.

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My Lords, it is a great consolation to me, having formed a different opinion formerly from that which I now feel myself bound to express, to find that men to whom I should be glad to consider myself as approaching at all nearly in point of legal knowledge, have formed the same opinion. I never can be ashamed of being in error, when I follow in my error my Lord *Kenyon* and my Lord Chief Baron *Thompson*, two of the best lawyers that ever I remember within any Court of *Westminster Hall* upon the subject, who have given an opinion upon this question, and that opinion given by them is now at variance with that which has been so well expressed by my learned brothers. When the opinion of those learned persons is at variance with the opinion expressed here, it is enough to say that there is some questionable doubt upon the subject; and that was sufficient to render it in my opinion highly proper for the officers of the Crown to bring it under the consideration of your Lordships; but that very circumstance brings it within the rule which, as long as I have any thing to do with the administration of justice, I shall always act upon, and that is, to give the benefit of any doubt to the subject, and not to the Crown. It is not the subject who makes the law, it is the Crown who proposes the law, and by whom the law is prepared; and if there be any ambiguity, let the Crown suffer, and not the subject. My Lords, for these reasons, though I am rather taking it out of the hands of my noble and learned friend, to whom it is due to say, that he always entertained the opinion that has been expressed by the Judges, I move your Lordships that the judgment of the Court below be affirmed.

Lord TENTERDEN.—My Lords, I entirely agree in the opinion that has been delivered to your Lordships by the learned Judge, and in the reasons upon which that opinion has been founded; and it therefore will be unneces-

sary for me to occupy many minutes of your Lordships' time, especially as I have the satisfaction to find that my noble and learned friend, who differed from me upon a former occasion, has now brought himself to think that the opinion delivered by the learned Judges is correct.

My Lords, when the Legislature thought fit, in the first place, which I believe to have been in the 17th year of the reign of his late Majesty *George* the Third, to impose a duty upon the produce of sales by auction, it appears that they thought that that would be improperly harsh, if it should extend to the case of creditors, so as to diminish the funds out of which their debts were to be paid. I think it is impossible to read even that first act, without seeing that such was the intention; and we should therefore be anxious to find that the language used was such as to carry that intention into effect.

My Lords, there is some difference in the language of the different acts; the parallel expression in the first act of the 17th of *Geo. 3*, is, goods and effects of a bankrupt, which, following the provision with respect to sales made by the sheriff in execution, might perhaps have left a doubt whether those words would apply to the case of a bankrupt's estate. Whether that doubt then existed, and therefore gave rise to the exception in the 19th of *Geo. 3*, and to an alteration of the language in that act, does not appear; but in the 19th *Geo. 3*, the words are, estates and effects of the bankrupt, sold by order of assignees. The words of the exception in the 43rd of *Geo. 3*, are nearly the same, and thus the law stood at the time of the decision of the case, which has been much relied upon, *The King v. Abbott*, in the *Exchequer*. But, before this case came on for decision, the 6th *Geo. 4* passed, which has words somewhat larger, for there the words are, all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty. If this case turned upon the construction of this act, the

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question would be, what is meant by the real estate of a bankrupt.

My Lords, I have always thought, that where we are to put a construction upon an act of Parliament which does not relate, or profess to relate to some particular subject of art or science, we should understand the words in the act in the same way as they are understood in the common language of mankind; and I think it cannot be doubted, that, in common language, when you speak of the estate of any person subject to mortgage, you would call it the estate of the mortgagor—in the common language of mankind you would speak of it as his own estate.

This being so, the intention of the Legislature being perfectly clear, it appears to me that the true construction of those words is, to treat this as the estate of the bankrupt. It is clear, that unless the whole interest is so treated as his estate, the fund for the creditors will be diminished, that is, if you are to divide the sale, and to consider the equity of redemption as his, and the incumbrance as not being his, so that the duty shall be paid upon so much of the proceeds as may be considered as applicable to the discharge of the incumbrances; it is clear, that if you so construe the act upon the present occasion, the amount of duty payable upon that portion of the sale, will go to diminish the fund out of which the debts are to be paid, which I consider to have been the original object of the Legislature to prevent; and it seems to me therefore, that, both according to the intention and according to the ordinary effect of these words in the act of 6 *Geo.* 4, no part of the produce of the estate is liable to the duty.

Judgment affirmed.

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SMITH *v.* ANNE POCKLINGTON and HENRY SHARPE POCK-
LINGTON.

THIS was an action by the plaintiff, as lessee of the defendants, on an implied covenant. The declaration, reciting a certain indenture made between *Anne Pocklington* (one of the defendants) therein described as mortgagee in fee of the demised premises, of the first part; *Henry Sharpe Pocklington* (the other defendant) therein described as the owner in fee simple of the equity of redemption of the same premises, of the second part; *John Jenkins* (who was the trustee of a term) of the third part; and the plaintiff, of the fourth part; stated, that the defendant, *Anne Pocklington*, at the request and by the direction of the defendant *Henry Sharpe Pocklington*, did thereby demise and lease, and the said *John Jenkins*, at the request and by the direction of the said *Henry Sharpe Pocklington* and *Anne Pocklington*, did demise and lease, and the said *Henry Sharpe Pocklington* did grant, demise, and lease unto the said plaintiff, a certain piece or parcel of ground, &c., with liberty to make tram roads, &c., for carrying and conveying coal, &c. *And also full and free liberty, power, and authority to and for the said plaintiff, his, &c., to erect, build, and make any wharf or wharfs, quay or quays, upon the said ground thereby demised, in, at, or near the side or bank of the river Tawe, for the shipping of the said coal, &c.*

Breach—That the defendants and *Jenkins*, at the time of the making of the said indenture, *had not in themselves or in any or either of them good right, full power and absolute authority* to demise and lease unto the said plaintiff, full and free liberty, power, and authority to and for the said plaintiff, his &c., to erect, build, and make &c., (following the above words of the lease).

Covenant against *A.* and *B.* on a covenant supposed to be implied as incident to a demise by lease. On production of the lease, it appeared, that, in point of law, *A.* only demised, and that *B.*, who had an equitable interest merely, confirmed:—*Held*, that the action was not maintainable against *A.* and *B.*

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The defendant pleaded *non est factum*, and took issue upon the above and other breaches.

On the trial, before *Bolland, B.*, at the last Assizes for the county of *Glamorgan*, it was contended, on the part of the plaintiff, that, as incident to the demise (a), the lessors had impliedly granted to him the right of carrying his wharfs over their land, lying between the demised premises and low-water mark, and which land they had, in fact, previously demised to another party. The learned Judge nonsuited the plaintiff, and gave him leave to move to enter a verdict for nominal damages.

Whitcombe was now about to move accordingly, but was stopped by the Court on another ground.

LORD LYNTHURST, C. B.—The action being brought on an implied covenant, *arising out of the demise*, the plaintiff was bound to prove a *joint* demise by the two defendants. On the production of the lease, it appears that one defendant was mortgagee, and the other entitled only to an equity of redemption; so that the deed operates as a demise by one, and an equitable confirmation by the other. *Henry Sharpe Pocklington* is a stranger in law to the estate, he could make no legal demise, and you cannot, therefore, imply a covenant by him. You have, then, too many defendants, which is an insurmountable difficulty.

Rule refused.

(a) 1 Saund. 322 b, n. (6); *Holder v. Taylor*, Hob. 12.

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JONES v. CLARKE.

FINLAYSON v. Same.

TWO actions were brought in the Court of Great Sessions for the county palatine of *Chester*, against the defendant, a magistrate, for trespass and false imprisonment. The causes were set down for trial at the *Spring* Great Sessions, 1830, but, on an application made by the defendant, the Court stayed the proceedings, and ordered Mr. *Whitehead*, the plaintiff's attorney, to pay the defendant's costs. A rule to that effect was served on him, with the *allocatur* of the Prothonotary of the Court of Great Sessions; which not being obeyed, an attachment was issued at the *Summer* Great Sessions following. On this attachment Mr. *Whitehead* was arrested at the latter end of *September*, and gave bail to the Sheriff for his appearance at the return of the writ. The act of 11 *Geo. 4* and 1 *Wm. 4*, c. 70, abolishing the Court of Great Sessions, had received the royal assent before the issuing of the attachment and the arrest, but had not then come into operation. The attachment was therefore made out in the ordinary form, and was made returnable before the Justices of *Chester*, at *Chester*, on the first day of the then next Sessions for the county of *Chester*. The condition of the bail-bond was in the same terms. On the first day of the *Chester Spring* Assizes of 1831, (the day on which, but for the abolition of the judicature, the writ would have been returnable), Mr. *Whitehead* attended with the Sheriff's officer before the Judges of assize, then sitting under English commissions of *nisi prius*, &c., who, having no jurisdiction, declined to take cognizance of the matter. By the act of 11 *Geo. 4* and 1 *Wm. 4*, c. 70, all suits and *proceedings thereon*, pending in the Court of Sessions at the time of the abolition of the judicature, were transferred to the Court

The late Court of Great Sessions for the county of *Chester*, at the summer sessions, 1830, issued an attachment returnable at the next Great Sessions against the attorney in a cause for non-payment of the defendant's costs. Before the next Great Sessions, the act abolishing the Court (11 *Geo. 4* and 1 *Wm. 4*, c. 70) came into operation; but, previously to that time, the Sheriff had taken a bail bond for the appearance of the attorney, pursuant to the attachment. The Sheriff being ruled in the *Easter Term* following to return the writ into the Court of *Exchequer*, returned *cepi corpus*, and that he was ready to have had his body before the Justices of *Chester* at the return; but that, before the return the Court was abolished:—*Held*, that the return was insufficient, and

that the applications against the Sheriff in *Easter Term* were in time.

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of *Exchequer*. In *Easter Term*, the defendant having filed a certificate of the late Prothonotary of the Court of Great Sessions for the county of *Chester*, setting forth the proceedings, obtained a rule in the *Exchequer*, calling upon the Sheriff to return the writ of attachment. The Sheriff thereupon moved the Court to be excused from making any return; but the rule *nisi*, which he had obtained for that purpose, was after argument discharged, and he was ordered to make such return as he should be advised, the Court at that time intimating an opinion that the parties to the bail-bond had not substantially complied with the condition, and were consequently not released. The Sheriff then made the following return:

“ I hereby certify to the Barons of his Majesty’s *Exchequer* at *Westminster*, that, by virtue of the annexed writ from the late Court of Sessions at *Chester*, I did attach the therein named *Roger Whitehead*, and did him safely keep, and was ready to have had his body before the therein named Justices of *Chester*, at *Chester*, on the first day of the therein mentioned Sessions of the county of *Chester*, at *Chester*, as in the said writ I was commanded; but that the jurisdiction of the said Court of Sessions was abolished before that day, that is to say, on the 12th day of *October*, in the first year of the reign of our Lord the now King.

The answer of *George Walmsley*, Esquire, Sheriff.”

The defendant then obtained a rule calling upon the Sheriff to shew cause why this return should not be quashed, and why an attachment should not issue against him; against which rule cause was now shewn by

Lloyd, who contended, *first*, that the Court had no jurisdiction, inasmuch as this was not a suit pending in the Court of Sessions at the time of its abolition. The suit in that Court, and all proceedings in that suit

had been stayed by the order of the Court of Sessions. This, therefore, was a new suit founded on the contempt of a Court which had now ceased to exist, and of which the *Exchequer* could not take cognizance. *Secondly*, that the Sheriff having a right to take bail, and being bound to take it in the terms of the writ, had been guilty of no default or misconduct; and if the appearance of *W.* according to that condition became impossible by act of law, the sheriff ought not to be made responsible for the consequences; and *thirdly*, that, at all events, the defendant had been guilty of *laches* in not calling upon the Sheriff sooner, because, the act having come into operation on the 12th October, 1830, and transferred the jurisdiction to the *Exchequer*, the first term, which would have corresponded to the time at which the writ was made returnable in the Court of Sessions, would be *Michaelmas* Term last, and that the Court therefore would not extend relief to him to the injury of the Sheriff.

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Cottingham, contra, referred to *Phelps v. Barrett* (a), as shewing that the Sheriff was not authorized to take bail on an attachment, and argued, that though that case was at variance with *Morris v. Heyward* (b), and *Lewis v. Morland* (c), yet these cases shewed that he is not compellable to take bail; but if he do so, it is at his peril. He submitted that the Sheriff in this case was not in any situation of hardship, having the security of the bail-bond which he had chosen to take; and urged, that the proceedings in the Court below were removed into this Court by the operation of the act, and that the defendant had done all that was requisite by lodging the proper certificate, and applying for the present rules, which were proceedings in the same suits which were commenced in the Court of Great Sessions for *Chester*.

(a) 4 Price, 31.

(b) 6 Taunt. 569.

(c) 2 B. & A. 63.

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LORD LYNTHURST, C. B.—By the operation of the act, and the certificate of the Prothonotary, the cause has been removed into this Court, and we have jurisdiction over it. The Sheriff in this instance was not bound to take bail. If he had not done so, the party would have remained in his custody, and I am of opinion that it would have been his duty to have produced him in this Court in *Michaelmas* Term. The Sheriff, however, took a bail-bond, and the time for the appearance of the party under the bail-bond did not expire till the *Spring* Assizes; and I think, therefore, that the defendant is in time in making his application against the Sheriff in this term, and that this rule should be made absolute.

BAYLEY, B.—I am of the same opinion. The Sheriff is not bound to take a bail-bond on an attachment. If he does take it, he does so at his peril, and the party suing out the attachment is not to be put in a worse situation by his so doing. In the present case, if the Sheriff had not taken bail, the party would have been in custody until *Michaelmas* Term. In the meantime, the Sheriff had taken a bail-bond. We are not bound to say that the taking bail was wrong, but we may look to the situation in which the parties were placed thereby. The bail-bond was taken for appearance in March; that gave an indulgence till that time. If the party did not think proper to take proceedings against the Sheriff till after that time, he has nothing to complain of; but the time may be considered as enlarged by consent; after that period, the first opportunity for taking any step against the Sheriff would be the first day of this term. At that time, such proceedings are taken as bring the causes into this Court. Then the Sheriff is ruled, and makes a return, which is insufficient. If he sustain any injury, it arises from his having taken a bail-bond under perilous circumstances.

BOLLAND, B.—I am of the same opinion. I think that this application has been made within a reasonable time, under the circumstances. The section of the act, which removes the proceedings of the Court of Great Sessions at *Chester* into this Court, directs that they are to be dealt with according to the practice of this Court, or of the Court from whence the same are transferred, according to the discretion of this Court. Now, the plaintiff in this case, according to the practice of the Court of Great Sessions, was not bound to make his return until the Great Sessions which would have been held in *March*. I think, therefore, that we should regulate our proceedings in this case by what would have been done by the Court below. That Court would have had no jurisdiction till the Great Sessions in *March*; and I therefore think, that the party was in time in applying to this Court in the present *Easter Term*.

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Rule absolute.

CHAMBERS v. BERNASCONI and Others.

ASSUMPSIT for money had and received, brought by the plaintiff against his assignees, to try the validity of a commission of bankrupt against him.

The cause was tried before Lord *Lyndhurst*, C. B., at the Sittings after last *Hilary Term*.

The principal question at the trial was, whether the plaintiff had committed an act of bankruptcy; and this question mainly turned upon the place where an arrest of the plaintiff on the 9th of *November*, 1825, had taken place; the evidence for the defendants shewing, that the

A Sheriff's officer sent a written memorandum to the Sheriff's office, stating that he had arrested *A. B.* at a certain place, this return was filed at the Sheriff's office, and, the officer being dead, was received in evidence to prove the place of such arrest in an action between *A.*

B. and a third party: the Court granted a new trial, intimating a strong opinion that such return was not evidence of the place of arrest, but giving the party an opportunity of putting the question upon the record.

Semble, that such return was not receivable in evidence for any purpose.

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arrest took place at *Paddington*, and the witnesses for the plaintiff proving that it took place in *South Molton-street*.

The defendants called a witness of the name of *Brett*, who stated, that, in 1825, he was the assistant of a Sheriff's officer, (since deceased), of the name of *Wright*; and that he and *Wright* went to the plaintiff's cottage at *Paddington*, on the 9th of *November* in that year, in order to arrest the plaintiff; that a servant of the plaintiff's denied that he was at home; but that the witness and *Wright* insisted on searching the cottage, and arrested the plaintiff there.

For the plaintiff, evidence was given to shew that he was only arrested once on the 9th of *November*, 1825, and that such arrest took place in *South Molton-street*. Mr. *Birchall*, the deputy under-sheriff of *Middlesex*, was called, and he produced a certificate signed by *Wright* the officer, and sent in by him to the Sheriff's office, and there filed, of which the following is a copy:

9th *November*, 1825.

" Arrested *Abraham Henry Chambers* the elder, in *South Molton-street*, at the suit of *William Brereton*.

" *Thomas Wright*."

Mr. *Birchall* stated in his evidence at the trial, that the officers are always required to give in such certificates immediately after the caption; that the certificates are the foundation for the return of the writs; that the officers are charged by their certificates of the caption; and that they are required to insert in the certificates the place of arrest (a).

(a) In the course of the argument, Mr. *Birchall* informed the Court, that at the trial his attention had been directed to the practice of the Sheriff's office at that

time, and that he thought that in 1825 the practice of requiring the officer to make a return of the place of the arrest had not been adopted.

At the trial, the certificate in question was offered in evidence for the plaintiff, and was objected to by the defendants' counsel, who contended that it was not a document against the interest of the party making it; and that, at all events, though it might be evidence of the arrest, it was not evidence of the place where that arrest was made.

The evidence was received, and the plaintiff had a verdict.

Sir *James Scarlett* obtained a rule for a new trial, on the ground, (amongst others, on which the decision of the Court did not proceed), that this certificate had been improperly received in evidence.

Campbell, Follett, and Butt, shewed cause.—The certificate of *Wright* was admissible, not as evidence to contradict *Brett*, but as substantive evidence of the place where the arrest took place. It was admissible on the principle established by all the cases in which the entries of deceased persons made against their interest have been received. The present is an entry of a deceased person, as to a fact of which he is peculiarly cognizant, made in the usual course of business, contrary to his interest, and charging himself. It is not even necessary that the entry should charge the person making it with the receipt of money; as, in *Davis v. Pierce* (a) and other similar cases (b), the directions of deceased tenants were admitted to prove the seisin of their landlords. In *Phillipps on Evidence* (c), the rule is thus laid down: "The declarations or statements of deceased persons have been admitted in many cases where

(a) 2 T. R. 53.

(b) See the whole of the cases on the subject of the admissibility of the declarations of deceased persons collected by Mr. *Joshua*

Evans in the notes to *Barker v. Ray*, 2 Russ. 66.

(c) See 1 Phill. on Ev. 243, and the cases there cited.

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they appear to be made against their interest; as entries in their books, charging themselves with the receipt of money on the account of a third person, or acknowledging the receipt of money due to themselves. In either case the entry is to their own immediate prejudice, and strong evidence of the fact in consideration of which the money is said to have been received or paid."

In *Short v. Lee* (a) the Master of the Rolls said—"These documents possess those qualifications which always make the declarations of the deceased persons evidence; namely, that they were persons having a competent knowledge, or whose duty it was to know, having no motive to make a false representation, and their written declarations being directly at variance with their own interest, which declarations are universally evidence, as in the cases of the entries made by the attorney or the midwife."

The case of *Champneys v. Peck* (b) decided, that an indorsement of having served a copy made at the time, on the back of an attorney's bill, by a deceased clerk, whose duty it was to serve it, was admissible. That case seems to shew, that any entry made by a person having a duty to perform in the course of office, is admissible after his decease. It is not necessary, however, in the present case, to go the length of that decision. In the recent case of *Middleton v. Melton* (c), an entry by a deceased collector of taxes, charging himself with the receipt of money, in a private book, was held to be evidence against a surety of the fact of the receipt of money, upon the general principle, that the entry was against the interest of the party making it. The only doubt in that case arose from the book being a private book merely, which the party was not bound to keep.

Where such entry is receivable, it is clearly evidence not only to prove the receipt of the money, but to prove

(a) 2 Jacob & Walk. 483. (b) 1 Stark. Rep. 404. (c) 10 B. & C. 317.

any collateral matter stated in the entry. Thus, in *Short v. Lee* (a), the entries were admitted as evidence to prove collateral matters.

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So, in the case of the man-midwife (b), the entry was received as evidence to prove the time of the birth, and not merely the fact of the payment. Indeed, in almost all cases as to entries of this nature, it is not the mere fact of the payment, but some collateral fact, which is sought to be established by the entry.

In *Haddon v. Parry* (c), the Court of *Common Pleas* were of opinion that a bill of lading signed by a deceased master of a vessel was evidence of interest in the goods, as against third parties. It can surely make no difference whether an entry acknowledges the receipt of goods or of money. In the present case, the party is deceased; the entry was made in the usual course of official business, and it was made immediately, and before any bail-bond was given. It was against the interest of the party making it, for it would have been evidence in an action brought against him by the Sheriff. Suppose that a *feri facias* issues to a Sheriff, and that his officer, to whom he has granted a warrant, returns to him that he has levied 500*l.*, it is quite clear that such an entry would charge himself, and would be evidence within the rule, as to entries of deceased persons. Then, what difference is there between a *feri facias* and a *capias*, in this respect? He charges himself with the custody of the body, and he cannot afterwards return *non est inventus*; and the document would be evidence against him. The evidence, therefore, was properly received.

Sir James Scarlett, Pollock, and Hutchinson, *contra*.—*Higham v. Ridgway* pushed the doctrine as to the ad-

(a) 2 Jac. & Walk. 464.

(b) *Higham v. Ridgway*, 10 East, 109.

(c) 3 Taunt. 305.

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missibility of evidence of this description to the extreme point. The admission of such documents has crept on by very gradual advances, but it would be very dangerous to admit them as evidence of any collateral matter. It is not disputed that a steward's entry, charging himself with the receipt of rent, or of satisfaction money for trespasses, and other entries of that description, are properly receivable in evidence. But there the fact to be proved is part of the *res gesta*, and of one entire transaction, without which the entry means nothing, and not a collateral circumstance, as in the present case. If entries of this nature are once admitted to prove collateral matters, to what a length would the doctrine lead? If the officer's return of the place is evidence after his decease, his verbal statement would also be evidence. Suppose an action brought for a debt, would the return or declaration of a deceased officer, stating, I arrested the defendant and he admitted the debt, be evidence? If the place of the arrest be proved in such manner, the time would also be so proveable; and if the time and place, why not the company? so that a document of this description would be evidence for or against a prisoner on a question of an *alibi*. When you once go beyond the line of confining such evidence to what is necessary to explain what the entry was, there is no saying where you are to stop; which was a question put by Lord Eldon to the counsel in *Barker v. Ray*. *Higham v. Ridgway* is a perplexing decision; there was a strong inclination to let in the real justice of the case, and to support the recovery. From the juxta-position of the entries, the book itself spoke; and, perhaps, that decision may be supported as on a question of pedigree.

[Lord *Lyndhurst*, C. B.—None of the Judges put that case on the ground of pedigree].

The payment appeared most clearly, from the nature of the entries, to be on a particular day, and the birth must have happened before. But that case ought not to be

taken as an authority, to establish that all collateral matters in such an entry are admissible in evidence. There are many cases where admissions against a man's interest are not evidence after his death. Nothing can be more against interest than the admission of a crime, but a letter or statement of a deceased person admitting a crime would not be evidence.

[*Bayley, B.*—There is one instance, where a subscribing witness, on his death-bed, acknowledged the falsehood of his attestation; but that is the only instance, and is the exception to the general rule].

The admissibility of such entries ought to be confined to entries of the receipt of monies, for which the party making the entry is accountable. The receipts of dead men are often rejected, but the true principle is, that such entries are evidence, where the party is made accountable by them. A steward's entry is evidence on the ground of his being chargeable thereby. A tenant's declaration as to what landlord he holds under is evidence, as being explanatory of the act of possession and occupation. It is evidence as of an act done by the tenant; as if a man turn up a clod and say, I turn up this clod on behalf of *A. B.*

[*Lord Lyndhurst, C. B.*—Possession is *prima facie* evidence of ownership, and a tenant's declaration is evidence as cutting down the fee].

It is also evidence on the other principle, as explanatory of the fact of possession. *Salte v. Thomas* (a) shews that an entry may be evidence for one purpose, and not admissible as to other collateral matter contained therein.

LORD LYNDBURST, C. B.—Confining myself to the question, whether the memorandum of *Wright* was properly received in evidence, I am of opinion that the reception of

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(a) 3 B. & P. 188.

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such evidence goes much beyond any of the cases on this subject. We think the question of so much importance, that we wish the parties to have an opportunity of putting it on the record.

BAYLEY, B.—I am entirely of the same opinion. I doubt, even supposing that this paper were receivable at all, whether it was receivable to prove the *place* where the arrest happened. It may be the duty of the Sheriff's officer to make a return to the Sheriff, that he has made the arrest, but it is not a necessary part of that duty that he should state the particular place of the arrest.

Seeing the length to which such evidence would go if admissible to prove every matter which the officer may take upon himself to state on his return, my present impression is, that the return is not evidence as to the place of the arrest; and indeed that the return was not receivable in evidence at all.

The principle acted upon in the cases of *Doe v. Robson* (a), *Higham v. Ridgway* (b), and *Middleton v. Melton* (c), was, that it was against the interest of the party to make the statement at the time of making it. Now I cannot see how the statement in the present case was against the interest of the officer. He had a duty to perform, and the effect of what he says is only this—"I have done my duty." I think therefore that the statement in question does not fall within the principle upon which the class of cases which has been referred to were decided.

GARROW, B., concurred.

BOLLAND, B.—From the commencement of the argument, it struck me that this statement could not be evi-

(a) 15 East, 33.

(b) 10 East, 109.

(c) 10 B. & C. 317.

dence. I have always considered the cases which have been alluded to, as carrying the doctrine too far, and I should be very sorry to give any opinion which might have the effect of carrying it further.

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1831.

CHAMBERS
v.
BERNASCONI.

Rule for new trial absolute.

Sir *James Scarlett* had obtained a rule to amend the pleadings, by striking out the plea of the general issue, and pleading the bankruptcy of the plaintiff, on the ground that the proof of the affirmative, the bankruptcy, lying upon the defendant, he ought to begin and have the general reply; and it was said that, in the present case, the defendant had sustained great inconvenience and hardship, from the plaintiff beginning and having the general reply.

After a trial and verdict for plaintiff, the Court refused to allow a defendant to amend by striking out the general issue, and pleading the bankruptcy of the plaintiff, for the purpose of giving the defendant the right of beginning, and of the general reply at a second trial.

The Court, however, after hearing counsel, and taking time to consider, thought that the pleadings ought not to be so amended in this stage of the cause; and the rule for amending the pleadings was

Discharged.

Re WETTON.

UPON the motion of *Whitcombe*, a writ of *habeas corpus* was granted by *Bolland*, B., directing the gaoler of his Majesty's gaol of the county of *Stafford*, to have the body of *Wetton* (a prisoner in the custody of the Sheriff of *Staffordshire*, and against whom a bill of indictment had been found in the county of *Middlesex*), at the next general sessions of *oyer* and *terminer* of our lord the King, to be holden in and for the county of *Middlesex*, at the *Sessions House* for the said county, at &c., on &c.

Where a defendant is in custody in the county of *A.*, upon an attachment issuing out of this Court, he may be removed to the county of *B.* to take his trial upon an indictment found in the latter county.

Notice of the motion had been given to *Wetton*, and to the gaoler of *Stafford*.

Each of Pleas,
1831.

EVANS, an Infant, suing by *Prochein Amy*, v. DAVIS.

The Court of Great Sessions ordered an infant, suing by *prochein amy*, to pay costs, and this Court granted an attachment against the *prochein amy*, for disobeying that order.

BEFORE the abolition of the *Welsh* judicature, an order was made in the Court of Great Sessions upon the infant plaintiff to pay certain costs. The cause was subsequently removed into this Court, and a rule *nisi* for an attachment for non-payment of the costs was obtained against the infant, but this rule was abandoned; and, upon the motion of *Ball*, a rule was obtained, calling upon the *prochein amy* to shew cause why an attachment should not issue against her for non-payment of the costs; which rule, no cause being shewn, was made—

Absolute (a).

(a) See 2 Arch. Pract. 155; 1 Tidd, 100.

SMITH v. COOPER'S Assignees.

After one successful opposition of bail, 5*l.* must be deposited with the Master, to cover the costs, before the bail can justify.

CHILTON objected to the justification of the defendants' bail in this case, unless the sum of 5*l.* was deposited with the Master, to cover the costs of a former successful opposition.

BAYLEY, B.—The practice is otherwise in the *King's Bench*, there the plaintiff is not entitled to costs, unless the defendant has given three notices; but—

The Master certified that in this Court the plaintiff was entitled to the deposit after one successful opposition of the defendant's bail; and—

The money was accordingly deposited (a).

(a) By the practice of this Court, the plaintiff is entitled to costs upon the second notice of justification, if a brief be delivered to coun-

sel to oppose the bail upon the first notice. *Barron v. Whitehead*, 2 Y. & J. 3.

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1831.

COMMELIN v. THOMPSON.

JOSHUA EVANS moved for judgment on a demurrer, for the plaintiff; but the Court refused the application, because the demurrer books had not been delivered by the defendant to the two junior Barons. On a subsequent day, the plaintiff having, in the meantime, delivered the demurrer books to the junior Barons on the behalf of the defendant, the motion was—

Before the plaintiff can move for judgment upon demurrer, the demurrer books must be delivered to all the Barons, and if the defendant do not deliver his books, the plaintiff must deliver them on his behalf.

Granted (a).

(a) Formerly, before a *concili-um* could be moved for, a rule must have been given to bring in the demurrer books; this is now unnecessary; and, for the future,

it will be sufficient to deliver the books to the Barons two days before the day of argument. R. T. T. 1831.

—◆—

COLE v. DYER.

ASSUMPSIT. The first count of the declaration stated, that before the making of the promise and undertaking thereafter mentioned, a certain action had been commenced and prosecuted by one *Richard Ridley* against *James Ashdown*, before the Barons of his Majesty's *Exchequer*, for the recovery of a certain sum of money, to wit, the sum of 14*l.* 8*s.* 6*d.*, due and owing &c. from the said *James Ashdown* to the said *Richard Ridley*, and which said action, at the time &c., was depending, whereof the defendant had notice; and thereupon heretofore, to wit, on the 6th day of *November*, 1830, he, in consideration of the premises, and that the said *Richard Ridley*, at the special instance and request of the said defendant,

A guarantee in the following form—" *R. R.*, plaintiff, and *J. A.*, defendant: We, the undersigned, jointly and severally undertake and agree to pay *G. C. C.*, gent., the debt and full costs in this action, provided on or before the 1st day of *Jan.* 1831, a sum of 11*l.* 10*s.* 3*d.* be not paid to him the said *G. C. C.* at his office, as the attorney for the plaintiffs. Dated this sixth

day of *Nov.* 1830," and containing in the margin the following letters and figures:—"Debt 6*l.* 11*s.* 11*d.*, costs 4*l.* 18*s.* 4*d.*; 11*l.* 10*s.* 3*d.*," does not shew a sufficient consideration to take it out of the 4th section of the statute of frauds, and consequently no action can be maintained thereon.

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1831.

COLE
v.
DYER.

would cease to prosecute the said action, and would stay all further proceedings therein, he the said defendant undertook &c. to pay him the said plaintiff the debt and full costs in the said action, provided on or before the 1st day of *January*, 1831, the sum of 11*l.* 10*s.* 3*d.* was not paid to him the said plaintiff, at his the said plaintiff's office, as the attorney for the said *Richard Ridley*. It then averred performance on the part of the plaintiff, and non-payment by the defendant of the sum of 11*l.* 10*s.* 3*d.* in manner and at the time and place as before stated, or of the sum of 19*l.* 6*s.* 10*d.*, the amount of the debt and full costs of commencing and prosecuting the aforesaid action. Money counts and an account stated.

The defendant pleaded, *first*, the general issue; *secondly*, that the supposed promise in the said first count was a special promise for the payment of the debt of another person, to wit, the said *James Ashdown*; and that no agreement in respect of the said supposed cause of action in the said first count of the said declaration mentioned, or any memorandum or note thereof, wherein the consideration for the said special promise was stated or shewn, was in the writing or was signed by the said defendant, or by any other person by him thereunto lawfully authorized. The replication took issue on the second plea.

At the trial before Lord *Lyndhurst*, C. B., at the Sittings in *Middlesex*, after last term, the plaintiff attempted to support his case by the production of the following guarantie:

Richard Ridley . . . plaintiff,
and

James Ashdown . . . defendant.

Debt . £6 11 11	We, the undersigned, jointly and severally undertake and agree to pay <i>George</i>
Costs . 4 18 4	<i>C. Cole</i> , Gent., the debt and full costs
—————	in this action, provided, on or before
£11 10 3	the 1st day of <i>January</i> , 1831, a sum
—————	of 11 <i>l.</i> 10 <i>s.</i> 3 <i>d.</i> be not paid to him the said <i>George C. Cole</i> ,

at his office, as the attorney for the plaintiff. Dated this 6th day of November, 1830. *Exch. of Pleas, 1831.*

(Signed)

James Ashdown.

John Dyer.

COLE
v.
DYER.

C. E. Law, for the defendant, objected to the admissibility of this instrument, inasmuch as it had no agreement stamp affixed to it; whereupon the plaintiff was nonsuited.

On a former day *Montague Chambers* had obtained a rule to shew cause why a new trial should not be had, on the ground that the agreement, which was rejected as evidence for want of a stamp, did not require a stamp, pursuant to the statute 55 Geo. 3, c. 184, Sched. Part 1.

C. Creswell now shewed cause.—It may be conceded, that the nonsuit cannot be supported on the objection made to the admissibility of the unstamped written agreement; but in deciding whether a new trial shall be granted, the Court will look at the whole of the pleadings, and see whether the plaintiff can by possibility recover in the action. The agreement of the defendant, as set out in the declaration, and as attempted to be made out by the production of the guarantie, does not specify any consideration for which the defendant's promise to answer for the debt of *James Ashdown* was made. It is true, that the declaration alleges the consideration to have been the staying of proceedings in the action between *Ridley* and *Ashdown*, but that is not expressed in the written instrument; in that there is no statement of any consideration, and therefore, by the provisions of the 4th section of the statute of frauds, as construed in the cases of *Wain v. Warlters* (a), and *Saunders v. Wakefield* (b), no action is maintainable on this agreement.

Montague Chambers, contra.—It is true, that in order

(a) 5 East, 10.

(b) 4 Barn. & Ald. 595.

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1831.

COLL
&
DYER.

to ground a right of action upon a written agreement to pay the debt of another person, some consideration must appear upon the face of the instrument itself, and that parol evidence, to shew what the consideration was, is not admissible. But it is not necessary that the consideration should be stated in express terms, or in the words used in the declaration, if, upon looking at the whole instrument, the alleged consideration can be collected or implied. To this extent only have the cases of *Wain v. Warlters* and *Saunders v. Wakefield* carried the construction of the statute of frauds. *Jenkins v. Reynolds* (a). That the Courts do not incline strictly to require that the instrument should precisely specify the consideration, but, on the contrary, will go far to imply a consideration, is clear from the cases of *Ryde v. Curtis* (b) and *Newberry v. Armstrong* (c).

[*Bayley, B.*—Here several considerations might perhaps be implied].

In the cases last cited it would not be difficult to surmise several considerations other than those alleged, and upon which the judgments affirming the validity of the agreements proceeded. Looking, however, at the whole of this guarantie, and connecting the words and figures in the margin with the body of the agreement, the consideration stated in the declaration may directly and fairly be implied as moving the defendant to make the promise, for the breach of which the action has been brought.

Lord LYNDHURST, C. B.—On looking at this instrument, various interpretations might be put upon its language, and several considerations, without much ingenuity, conjectured. It appears to me, that if, in such a written agreement to be answerable for the debt of another person, two distinct considerations may, with equal probability, be inferred as the inducement for that engage-

(a) 3 Brod. & Bing. 14. (b) 8 Dow. & Ryl. 62. (c) 6 Bing. 201.

ment, the writing is not taken out of the operation of the statute of frauds, and consequently can give no right of action.

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BAYLEY, B.—I do not know how to distinguish this case from *Saunders v. Wakefield*. The consideration in that case, as stated in the declaration, was similar to the present, namely, to cease to prosecute and stay all further proceedings in an action alleged to be depending against one *W. Pitman*, for the amount of a bill of exchange drawn by him: the agreement of the defendant there was, “*Mr. Wakefield* will engage to pay the bill drawn by *Pitman*, in favour of *Stephen Saunders*.” There was nothing there to shew that forbearance to proceed in the action was the consideration upon which *Wakefield* made that promise, nor would the Court make any such implication. What is there, then, in this guarantie substantially different, or from which we can plainly and directly know or imply that the dropping of the action between *Ridley* and *Ashdown* was the consideration upon which it was given? It appears to me that there is no language which can lead necessarily to this inference, and if any other agreement can be supposed to have existed, the consideration stated in the declaration cannot necessarily be implied. It may be that some other agreement existed with *Ashdown*, by which the plaintiff was to wait for payment by him till the 1st *January*; and afterwards, in consequence of some benefit conferred by *Ashdown* upon the defendant, he may have undertaken to pay the plaintiff if *Ashdown* did not. The actual consideration is not sufficiently expressed to take the agreement out of the provisions of the statute of frauds.

GARROW, B., and BOLLAND, B., concurred.

Rule discharged.

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1831.

HOCKIN v. REID.

Costs of the day for not proceeding to trial may be moved for after a rule for judgment as in case of a nonsuit has been discharged upon a peremptory undertaking.

ON a former day, *Erle* had obtained a rule *nisi* for judgment as in case of a nonsuit, and now moved for costs of the day for not proceeding to trial pursuant to notice.

The Master certified that the motion for the costs of the day should be made before that for judgment as in case of a nonsuit (a); and that a separate motion should be made for each.

LORD LYNTHURST, C. B.—We shall be in a condition to consider whether this rule should be granted, when the rule for judgment as in case of a nonsuit is disposed of.

BAYLEY, B.—If the first rule is made absolute, the defendant, having judgment as in case of a nonsuit, will be entitled to the costs of the cause including the costs of the day; if it is discharged with costs, the defendant ought not to have the costs of the day, and, if he have obtained a rule for that purpose, ought to pay the costs of that rule. In fact, however, the rule for judgment as in case of a nonsuit is, in general, only the means of obtaining a peremptory undertaking, and there is no reason why that rule should not be disposed of before the other rule is granted.

The rule for judgment as in case of a nonsuit was subsequently discharged upon a peremptory undertaking, and the rule for costs of the day was then

Granted.

Coleridge was for the plaintiff.

(a) See Dax's Pract. 76; Price's Pract. 308; *Morgan v. Bidgood*, 1 Price, 61; *Fisher v. Hodgkinson*, 2 Price, 90; Hull. on Costs, 404;

Arch. Pr. K. B. 217; Tidd, 759; but see *Lewis v. Thomas*, 4 B. & C. 260; 6 D. & R. 217.

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1831.

WAKELING v. WATSON.

THE *subpœna ad respondendum*, a copy of which was served upon the defendant in this case, was tested in the name of the late Lord Chief Baron, Sir *W. Alexander*, Knt. A rule having been obtained to set aside the service for irregularity, the Court suggested, when cause was about to be shewn, that this rule should be postponed, and that the plaintiff should take a rule to amend the writ.

It was accordingly amended, and the amendment being shewn for cause, the first rule was

The *teste* of a writ, if irregular in naming a late Chief Baron instead of the existing Chief Baron, may be amended, even after a rule to set it aside upon that ground; and upon the amendment being made, the rule will be discharged.

Discharged, without costs (*a*).

(*a*) A similar rule was obtained that the writ might be amended. by *Busby* in *Williams v. Hall*, but See *Morris v. Herbert*, 1 Price, withdrawn upon an intimation 245, *contra*.

MEMORANDA.

THE special paper will be taken on the *Wednesdays* in each Term.

Bail must be in attendance at the sitting of the Court, at ten o'clock. On the first and last days of term, bail may justify during the sitting of the Court.

END OF EASTER TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

IN

TRINITY TERM, 1 WILL. IV.



MEMORANDUM.

1831.

IN future it will not be necessary to give a rule to bring in demurrer books, but the motion for a *concilium* may be made without it. And it will be sufficient to deliver the books to the Barons two days before the day of argument.



REGULÆ GENERALES.

OF THE

Exchequer of Pleas.



Subpœna and
attachment.

WHEREAS, since the statute of 7 & 8 Geo. 4, c. 71, instances have occurred in which, upon proceedings in the Court of *Exchequer*, by way of *subpœna* and attachment,

defendants have been arrested upon writs of attachment, notwithstanding the same have not issued for a bailable cause of action, and it is desirable that such practice should be discontinued: IT IS THEREFORE ORDERED, that, from henceforth, no arrest shall be made upon any such writ of attachment, unless the same shall be for a bailable cause of action, and shall be duly marked and indorsed for bail.

1831.
REGULÆ
GENERALES.

LYNDHURST.
J. BAYLEY.
W. GARROW.
J. VAUGHAN.
W. BOLLAND.

31st May, 1831.

OF THE

King's Bench, Common Pleas, & Exchequer of Pleas.

Practice.

1. IT IS ORDERED, That a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. That, if the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the Court or a Judge shall otherwise order)

When bail may justify.

Time to inquire of bail.

1831,

REGULÆ
GENERALES.

the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime.

Notice of bail,
form of.

2. And it is further ordered, That every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any) where each of the bail resides, and all the streets or places, and numbers (if any) in which each of them has been resident at any time within the last six months, and whether he is a house-keeper or freeholder.

Costs of opposi-
tion and justifi-
cation of bail in
particular cases.

3. And it is further ordered, That, if the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form hereto subjoined, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification, and, if such bail are rejected, the defendants shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

If notice of ex-
ception not
given, justifica-
tion perfect.

4. And it is further ordered, That, if the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit.

Changing bail.

5. And it is further ordered, That the bail of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

Particulars of
demand to be
delivered with
declaration in
certain cases,

6. And it is further ordered, That, with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars

can be comprised within three folios; and, where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And, to secure the delivery of particulars in all such cases, it is further ordered, That, if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered with the Judge's Marshal.

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GENERALES.

or no costs on
summons.

Copy of particu-
lars of demand
and set-off to be
annexed to re-
cord.

7. And it is further ordered, That, upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance.

Time for plead-
ing.

8. And it is further ordered, That no judgment of *non-pros.* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney or agent, as the case may be.

No *non-pros.*
without notice.

9. And it is further ordered, That hereafter it shall not be necessary to issue more than two summonses for attendance before a Judge, upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shewn to the contrary.

Summonses.

1831.

REGULÆ
GENERALES.Delivery of de-
claration *de bene
esse*.

10. And it is further ordered, That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process, in the case of process which is not bailable, or until the expiration of six days from the time of the arrest, in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.

Ejectment, de-
claration in,
when served.

11. And it is further ordered, That declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the essoign, or first general return-day.

Notice to tax
costs.

12. And it is further ordered, That, before taxation of costs, one day's notice shall be given to the opposite party.

Pleading several
matters.

13. And it is further ordered, That no rule to shew cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances. Provided, That no summons or order shall be necessary in the following cases, that is to say, where the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas, shall be pleaded together; but, in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.

Rules on sum-
mons.In what cases
no rule neces-
sary.

14. And it is further ordered, That these rules shall take effect on the first day of next Michaelmas Term, except the rule as to the service of declarations in ejectment, which shall take effect from the 25th day of October next.

1831.

REGULÆ
GENERALES.
Commencement
of new rules.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITLEDALE,
S. GASELEE,

J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

FORM OF AFFIDAVIT [OF BAIL].

IN THE (*Exchequer of Pleas*).

BETWEEN, &c.

A. B., one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper [*or freeholder, as the case may be*] residing at [*describing particularly the street or place, and number, if any*]; that he is possessed of property to the amount of £ [the amount required by the practice of the Courts] over and above all his just debts; [*if bail in any other action, add "and every other sum for which he is now bail;"*] that he is not bail for any defendant except in this action [*or if bail in any other action or actions add "except for C. D., at the suit of E. F., in the Court of , in the sum of £ ; for G. H., at the suit of I. K., in the Court of , in the sum of £ ;" specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail*]; that

Affidavit of justification, see ante, p. 470, pl. 3, 4.

1831.

REGULÆ
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FORMS.

the deponent's property, to the amount of the said sum of £ , [and if bail in any other action or actions "of all other sums for which he is now bail as aforesaid,"] consists of [*here specify the nature and value of the property in respect of which the bail proposes to justify, as follows*]:—stock in trade, in his business of carried on by him at , of the value of £ ; of good book debts owing to him to the amount of £ ; of furniture in his house at , of the value of £ ; of a freehold or leasehold farm, of the value of £ , situate at , occupied by , or of a dwelling-house of the value of £ , situate at , occupied by , or of other property, particularising each description of property, with the value thereof]; and that the deponent hath for the last six months resided at [describing the place or places of such residence.]

Sworn, &c.

PLEADING.

WHEREAS declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties, by reason of their length, and the same may be drawn in a more concise form: Now, for the prevention of such expense, IT IS ORDERED, That, if any declaration in *assumpsit*, hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or, if any declaration in debt to be so filed or delivered for similar causes of action, and for which the

action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the defendant shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. AND IT IS FURTHER ORDERED, That, on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant, on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

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**TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITLEDAL,
S. GASELEE,**

**J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.**

SCHEDULE OF FORMS AND DIRECTIONS.

*Count on a Promissory Note against the Maker, by Payee
or Indorsee, as the case may be.*

FOR THAT WHEREAS the defendant, on the day of
 , in the year of our Lord , at London [*or, in
the county of*], made his promissory note in writing,
and delivered the same to the plaintiff, and thereby pro-
mised to pay to the plaintiff £ , days [*weeks or
months*] after the date thereof, [*or as the fact may be*],
which period has now elapsed, [*or, if the note be payable
to A. B.*], and then and there delivered the same to A. B.,

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and thereby promised to pay to the said *A. B.*, or order, £ , days [*weeks or months*] after the date thereof, [*or as the fact may be*], which period has now elapsed; and the said *A. B.* then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there, in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

Count on a Promissory Note against Payee by Indorsee.

WHEREAS one *C. D.*, on the day of , in the year of our Lord , at London [*or, in the county of*], made his promissory note in writing, and thereby promised to pay the defendant, or order, £ , days [*weeks or months*] after the date thereof, [*or as the fact may be*], which period has now elapsed; and the defendant then and there indorsed the same to the plaintiff, [*or, and the defendant then and there indorsed the same to X. Y., and the said X. Y. then and there indorsed the same to the plaintiff*], and the said *C. D.* did not pay the amount thereof, although the same was there presented to him on the day when it became due; of all which the defendant then and there had due notice.

Count on a Promissory Note against Indorser by Indorsee.

WHEREAS one *C. D.*, on , at London [*or, in the county of*], made his promissory note in writing, and thereby promised to pay *X. Y.*, or order, £ , days [*weeks or months*], after the date thereof, [*or as the fact may be*], which period has now elapsed, and then and there delivered the said note to the said *X. Y.*, and the said *X. Y.* then and there indorsed the same to the defendant, and the defendant then and there indorsed the same to the plaintiff, [*or, and the defendant then and there indorsed the same to Q. R., and the said Q. R. then and there indorsed the same to the plaintiff*], and the said *C.*

D. did not pay the amount thereof, although the same was there presented to him on the day when it became due; of all which the defendant then and there had due notice.

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Count on an Inland Bill of Exchange against the Acceptor by the Drawer, being also Payee.

WHEREAS the plaintiff, on _____, at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £ _____, _____ days [weeks or months] after the date [or, sight] thereof, which period has now elapsed, and the defendant then and there accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof, but did not pay the same when due.

Count on an Inland Bill of Exchange against the Acceptor by the Drawer, not being the Payee.

WHEREAS the plaintiff, on _____, at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to *O. P.*, or order, £ _____, _____ days [weeks or months] after the date [or sight] thereof, which period has now elapsed, and then and there delivered the same to the said *O. P.*; and the said defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof; yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due; and thereupon the same was then and there returned to the plaintiff: of all of which the defendant then and there had notice.

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Count on an Inland Bill of Exchange against the Acceptor by Indorsee.

WHEREAS one *E. F.*, on _____, at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said *E. F.* [or, to *H. G.*] or order, £ _____, days [weeks or months] after sight [or date] thereof, which period is now elapsed, and the defendant then and there accepted the said bill, and the said *E. F.* [or, the said *H. G.*] then and there indorsed the same to the plaintiff, [or, and the said *E. F.*, or, the said *H. G.* then and there indorsed the same to *K. J.*, and the said *K. J.* then and there indorsed the same to the plaintiff]; of all which the defendant then and there had due notice, and then and there promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.

Count on an Inland Bill of Exchange against the Acceptor by the Payee.

WHEREAS one *E. F.*, on _____, at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £ _____, days [weeks or months] after the sight [or, date] thereof, which period has now elapsed, and the defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof.

Count on an Inland Bill of Exchange, against the Drawer by Payee, on Non-acceptance.

WHEREAS the defendant, on _____, at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to *J. K.*, and thereby required the

said *J. K.* to pay to the plaintiff, £ , days [*weeks or months*] after the sight [*or, date*] thereof, and then and there delivered the same to the said plaintiff; and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the defendant then and there had due notice.

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Count on an Inland Bill of Exchange, against Drawer by Indorsee, on Non-acceptance.

WHEREAS the defendant, on , at London, [*or, in the county of*], made his bill of exchange in writing, and directed the same to *J. K.*, and thereby required the said *J. K.* to pay to the order of the said defendant, £ , days, [*weeks or months*] after the sight [*or, date*] thereof, and the said defendant then and there indorsed the same to the plaintiff [*or, and the said defendant then and there indorsed the same to L. M., and the said L. M. then and there indorsed the same to the plaintiff*], and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an Inland Bill of Exchange, against Indorser by Indorsee, on Non-acceptance.

AND WHEREAS one *N. O.*, on , at London [*or, in the county of*], made his bill of exchange in writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to his order £ , days [*weeks or months*] after the date [*or, sight*] thereof, and the said *N. O.* then and there indorsed the said bill to the defendant [*or, to R. S., and the said R. S. then and there indorsed the same to the defendant*], and the defendant then and there indorsed the same to the plaintiff, and the same was then and there presented to the said *P. Q.* for acceptance,

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and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an Inland Bill of Exchange, against Payee by Indorsee, on Non-acceptance.

WHEREAS one *N. O.*, on , at London [*or, in the county of*], made his bill of exchange in writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to the defendant or order £ , days [*weeks or months*] after the sight [*or, date*] thereof, and then and there delivered the same to the defendant, and the defendant then and there indorsed the said bill to the plaintiff [*or, to R. S., and the said R. S. then and there indorsed the same to the plaintiff*], and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Directions for Declarations on Bills where Action brought after Time of Payment expired.

1st. *On Bills payable after Date.*—If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz. *which period has now elapsed*; and, instead of averring that the bill was presented to the drawee for *acceptance*, and that he refused to *accept* the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

2nd. *On Bills payable after Sight.*—And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight,

it will be necessary to insert, after the words denoting the time appointed for payment, the following words, viz. *and the said drawee* [naming him] *then and there saw and accepted the same, and the said period has now elapsed*; and, instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due.*

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Directions for Declarations on Bills or Notes payable at Sight.

If a *note or bill* be payable *at sight*, the form of the declaration must be varied so as to suit the case, which may be easily done.

On Foreign Bills.

Declarations on foreign bills may be drawn according to the principle of these forms with the necessary variations.

COMMON COUNTS.

WHEREAS the defendant, on _____, at London [*or, in* Goods. *the county of* _____], was indebted to the plaintiff in £ _____, for the price and value of goods then and there bargained and sold, [*or, sold and delivered*] by the plaintiff to the defendant, at his request:

And in £ _____ for the price and value of work then Work. and there done, and materials for the same provided by the plaintiff for the defendant, at his request:

And in £ _____ for money then and there lent by the Money lent. plaintiff to the defendant, at his request:

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 Money paid. plaintiff for the use of the defendant, at his request:

Money receiv- And in £ , for money then and there received by
 ed. the defendant for the use of the plaintiff:

Account stated. And in £ , for money found to be due from the
 defendant to the plaintiff, on an account then and there
 stated between them.

General Conclusion.

And whereas the defendant afterwards, on &c., in consideration of the premises respectively, then and there promised to pay the said several monies respectively to the plaintiff, on request; Yet he hath disregarded his promises and hath not paid any of the said monies, or any part thereof, To the plaintiff's damage of £ , and thereupon he brings suit, &c.

Directions as to the General Conclusion.

If the declaration contains one or more counts against the maker of a note, or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the said *last-mentioned several monies respectively*.



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JOHN JERVIS moved for judgment against the casual ejector. The declaration was served *May* 19th. By the statute 1 *Wm.* 4, c. 70, *Trinity* Term is to commence on the 22nd *May*, which was *Sunday*.

Where the first day in full term falls on a *Sunday*, the essoign is to be calculated from that day.

BAYLEY, B.—*Sunday*, the 22nd of *May*, is the first day of term, and, although the Court does not sit upon that day, the essoign is regulated by that day. The 19th *May* would therefore be the essoign, and consequently the service is too late.

Where a declaration in ejectment was served on the essoign day by mistake, the Court directed the rule for judgment to be served on the tenants in possession, and granted the rule for judgment against the casual ejector absolute, unless cause was shewn in five days after such service.

John Jervis then contended, that, in the *Exchequer*, it was not necessary that the declaration should be served before the essoign day, because the proceedings were commenced by bill. He submitted, that, where the proceedings were by original, the judgment had reference to the essoign day (*a*); whereas, where the proceedings were by bill, the judgment referred to the first day in full term (*b*). This he urged as a reason why the like practice should not prevail in both cases; but—

The Court said, that the practice had been uniform in all the Courts; and that, whether the proceedings were by original or by bill, the declaration must be served before the essoign day.

Rule refused (*c*).

ON a subsequent day he renewed his application, on an affidavit that the plaintiff's attorney believed the 20th to

(*a*) *Turner v. Davies*, 2 Saund. 148; *Solomons v. Missen*, 2 T. R. 676.

(*b*) *Lee's Pract. Dict.* 862.

(*c*) See *Barnes*, 172; 14 East, 441.

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be the essoign day. And the Court directed the rule for judgment to be served on the tenants in possession who had not been served with the declaration before the essoign day, and granted the rule,

unless cause was shewn in five days after service of the rule for judgment on the tenant or tenants in possession, or one of several joint tenants.

C. Creswell afterwards made a similar application under the same circumstances, and, having stated that the Court of *King's Bench* had adopted the same course as this Court, took the—

Same rule (a).

(a) See R. T. T. 1831, *ante*, p. 472, pl. 11.

WOOD and Another v. CLARKE.

Materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home, are privileged from distress for rent due from the weaver to his landlord; but a frame or other machinery, delivered by the manufacturer to the weaver, together with the materials, for the purpose of being

used in the weaver's house in the manufacture of such materials, is not privileged, unless there be other goods upon the premises sufficient to satisfy the rent due.

REPLEVIN for a stocking frame, being in the dwelling-house of *William Dafforn*, in the borough of *Leicester*. Avowry, that the defendant took the said stocking frame as a distress for rent of the said dwelling-house, in arrear from the said *W. D.* Plea in bar, that the plaintiffs, before and at the said time when &c., were manufacturers of hosiery, and the trade and business of manufacturers of hosiery carried on within the borough of *Leicester*; that the said *W. D.*, before and at the said time when &c., was a stocking weaver, and the business and calling of a stocking weaver then carried on, of which premises the defend-

ant had notice; that the plaintiffs, shortly before the said time when &c., did, in the way of their said trade and business, employ the said *W. D.* in the way of his said business and calling, as their workman, for certain wages in that behalf, to weave and manufacture into stockings at his dwelling-house, being the said dwelling-house in the said declaration mentioned, certain worsted yarn of the plaintiffs, and for that purpose they the said plaintiffs, before the said time when &c., had delivered to the said *W. D.* the said worsted yarn of the said plaintiffs, together with the said stocking frame, in order that the said *W. D.* might, in his said dwelling-house, use and work the said last-mentioned stocking frame for the purpose of therewith and thereby weaving and manufacturing the said worsted yarn into stockings as aforesaid for the said plaintiffs, to be afterwards sold and disposed of by them in the way of their said trade and business, and that the said *W. D.* might, when and as soon as the said worsted yarn should be so woven and manufactured by means of the said stocking frame, return to the said plaintiffs such stockings, together with the said stocking frame; that the said *W. D.*, before the said time when &c., had and received from the said plaintiffs the said worsted yarn, and the said stocking frame for the purpose thereinbefore mentioned in that behalf, and the said worsted yarn and stocking frame at the said time when &c. were remaining and being in the said dwelling-house of the said *W. D.* for the purpose thereinbefore mentioned in that behalf, and in the way of the said plaintiffs' trade or business of manufacturers of hosiery, and of the said *W. D.*'s said business and calling of a stocking weaver, and for the furtherance, advancement, and maintenance of trade and commerce: and further, that, before and at the said time when &c., it had been and was the usage and practice in the trade of manufacturers of hosiery in the borough of *Leicester*, for manu-

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facturers of hosiery there, in the way of their trade, to deliver to their workmen, and for their workmen to have and receive from the manufacturers, worsted yarn of the manufacturers, together with stocking frames of the manufacturers, in order that the workmen might, in their dwelling-houses, use and work such stocking frames for the purpose of therewith and thereby weaving and manufacturing such worsted yarn into stockings for the manufacturers, &c., and that the workmen might, when and as soon as such worsted yarn should be so woven and manufactured by means of such stocking frames, return to the said manufacturers such stockings, together with the said stocking frames (*a*). Replication, that without the said stocking frame there were not in the said dwelling-house in which &c. goods and chattels distrainable by law, sufficient to satisfy the rent so due and in arrear. Demurrer and joinder.

Follett, in support of the demurrer.—The replication in this case is no answer to the plea in bar, because the stocking frame in question is privileged, not *sub modo*, but absolutely, as being an article in the hands of the tenant for the benefit of trade. Now, the authorities shew that goods of this description are privileged absolutely. Thus, in *Co. Lit.* 47. a., it is said: “Valuable things shall not be distrained for rent for benefit and maintenance of trade, which by consequent are for the common wealth, and are there by authority of law; as, a horse in a smith’s shop

(*a*) This case was twice argued, first upon a demurrer to the plea in bar, by *Chilton* for the demurrer, and *Alderson* for the plaintiff. Upon that argument it was suggested by the Court that the defendant should have replied that there was no other sufficient distress

upon the premises; but *Alderson* abandoned the point, and the Court, having taken time to consider of their judgment, directed the record to be amended and the case to be re-argued. See upon this point, *Dyer*, 312, and *Horthbury v. Levingham*, 1 Sid. 348.

shall not be distrained for rent, for the rent issuing out of the shop, nor the horse &c. in the hostry, nor the materials in the weaver's shop for making of cloth, nor cloth or garments in a tailor's shop, nor sacks of corn or meal in a mill, nor in a market, nor any thing distrained for damage feasant, for it is in the custody of the law; and the like." So (a), "Valuable things in the way of trade shall not be liable to distress; as, a horse standing in a smith's shop to be shoed, or in a common inn, or cloth at a tailor's house, or corn sent to a mill or market; for all these are protected and privileged for the benefit of trade, and are supposed in common presumption not to belong to the owner of the house, but to his customers." These instances are put merely as illustrations of the rule; and therefore, whatsoever goods are by the usage of trade and for the benefit of trade in the house of the tenant, they are privileged from distress, and the landlord must presume that they are not the property of the tenant. But the case of *Rede v. Burley* (b) carries the principle still further, and establishes that not merely the article itself, but the accompaniments of the article are privileged absolutely. There, a clothier having put certain wool to a spinner to spin, came afterwards with a horse to bring back the yarn, and because there was not any beam or weights in the spinner's house to weigh it, the clothier and spinner, by leave of one of the neighbours who had a beam and weights in his house, brought the horse thither, and entered therein to weigh the yarn, and whilst they were there, the lord of the house distrained that horse and the yarn for his services: and it was holden by *Anderson, Beaumont, and Owen* (*Walmsley contra*), that they were not distrainable, for the trade of a clothier is *pro bono publico*, who ought to be allowed all necessary means; and, without

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(a) 3 Bl. Com. 8.

(b) Cro. Eliz. 596; S. C. Noy, 68.

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doubt, cloth put to a weaver to be woven, nor yarn in a house to be spun be not distrainable; and weighing is as necessary as the former: wherefore the yarn brought thither for that purpose, and the horse which brought it, are privileged, and are not distrainable: the cause of the bringing privileged them, as a horse which carrieth corn to a market, and is set up for a time in a private house, is not distrainable, because his purpose of bringing the horse was *pro bono publica*. Whatsoever, therefore, is necessary for the carrying on of trade comes within the exception. Here, the tenant had no control over the implement, except merely for the purpose of working the yarn, and when that was done, both were to be returned together, according to the usage prevailing in the borough. It will be admitted, that the article is privileged, and upon no principle can the implement be distinguished from the article. In *Gisborne v. Hurst* (a), it was agreed *per cur.* that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are, for that time, under a legal protection, and privileged from distress of rent. Again, in *Gilman v. Elton* (b), where it was decided that the goods of a principal, in the hands of his factor, were privileged from distress for rent due from the factor, the judgment of the Court proceeded entirely upon the ground that the goods were upon the premises in the way of trade, and therefore protected. So, in *Thomson v. Mashiter* (c), and in *Mathias v. Mesnard* (d), the same principle was established. These authorities abundantly shew, that not only the article sent to be manufactured, but any thing sent to the house of another for a specified purpose in the

(a) 1 Salk, 249.

(c) 8 B. Moore, 260; S. C. 1

(b) 6 B. Moore, 243; S. C. 3 B.

Bing. 283.

& B. 75.

(d) 2 C. & P. 353.

way of trade, is privileged absolutely from distress for rent. Now, it is impossible to say that the implement in question was not in the custody of the tenant for a specified purpose in the way of his trade; and to hold it to be distrainable under the circumstances would tend materially to affect and narrow trade. The hardship upon the landlord, if such there be, has not escaped the attention of the Court in the cases referred to. If such be the custom of the trade, the landlord knows that he cannot look to the machinery for his rent, and must therefore take other security.

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But there are cases which may be cited for the defendant. These proceeded upon the qualified privilege, the privilege *sub modo*, which is applicable to implements of trade. In *Simpson v. Hartop* (a), the frame was let to the tenant, by virtue of which letting the tenant became possessed of the frame, and used it as an implement of his trade. There is, therefore, a marked distinction between that case and the present. There, the frame was let to the tenant and used in his trade, in the same manner as if it had been purchased by him; and upon that ground the judgment of the Court proceeded. Three propositions only were put by the Chief Justice, without alluding to that which is now in controversy; and the principle upon which this frame is said to be privileged, *viz.* the privilege of implements of trade from distress was expressly separated from that upon which the case was decided. That case, therefore, differs in facts from the present, and establishes no principle by which this case can be decided: but, if it be an authority, it is in favour of the plaintiffs, because it recognises the privilege in favour of trade.

[*Bayley, B.*—I rather think that that judgment, if considered, could not be supported, because the plaintiff, having no possession at the time, could not maintain the action.]

(a) Willes, 54, cited by *Buller, J.*, 4 T. R. 568.

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The case of *Gorton v. Falkner* (a), is equally inapplicable to the present question. The marginal note of that case is, that "implements of trade may be distrained for rent, if they be not in actual use at the time, and if there be no other sufficient distress upon the premises." No one would dispute the accuracy of that proposition, and if the case goes not beyond that, it is no authority for the defendant in this case. The case goes no further. The owner of the looms lent them to his workman upon condition that he should work for him only; and, therefore, although no rent was paid, yet the owner had an equivalent in the exclusive employment of the workman; the material fact in this case did not exist there, *viz.* that the yarn and frame were sent at the same time, to be re-delivered together when the work was complete. The facts of the case are therefore distinguishable, but the judgment of the Court is, at all events, no authority, because it proceeded merely upon the privilege of implements of trade. It is true, that the case was put in both ways in the argument, but the judgment of the Court did not touch the absolute privilege now contended for.

All the authorities are consistent, regard being had to the two propositions: things delivered to persons exercising their trade, are privileged absolutely, and implements delivered in the way of trade, for a specified purpose, and over which the tenant has no control except for that purpose, come within that rule; but implements of trade over which the tenant has a control, being the property of another, are privileged *sub modo* merely.

Chilton, contra.—The defendant, under the circumstances disclosed by these pleadings, had a right to distrain the stocking frame which is the subject matter of this action. If the frame distrained be brought within the excep-

(a) 4 T. R. 565.

tion in favour of trade, the circumstance of there not being a sufficient distress upon the premises without it, will not justify the taking; for goods within this exception are absolutely free from distress, and cannot be distrained even though there were no other goods. The question, therefore, is raised by the plea, and the replication was put upon the record merely to meet the modified exception in favour of implements of trade, should that be thought under the circumstances to exist. It must be conceded, that, if the frame be only privileged as an implement of trade, the replication is an answer to that privilege; and it must also be admitted, that, if the frame is within the exception in favour of trade, the replication is no answer. The general rule as to distress for rent is equally clear. In the language of Mr. Justice *Buller*, "whether the goods be the property of the tenant or a stranger is perfectly immaterial, provided they be on the premises, and be not privileged by law from a distress." *Gorton v. Falkner* (a). It is for the plaintiffs, therefore, to bring themselves within the exception. The rule upon this subject has been correctly stated from *Co. Litt.* 47. a., and 3 *Bl. Com.* 8; and in addition to those writers may be cited *Rolle Abr. Distress* (I), "*Mon toge en le shop d'un taylor ne peut estre distraint, nec mon cheval en un hosterie: 10 H. 7, 21 b, 7 H. 7, 2; nec mon cheval en le shop d'un ferror, que est la d'etre ferr, car la ley done liberte a mister mes biens la; 22 E. 4, 39 b;*" and *Gilbert* (b), who states the exceptions to the general rule thus:—"Valuable things in the way of trade shall not be liable to a distress: as, a horse standing in a smith's shop to be shoed, or in a common inn, or cloth at a tailor's house, or corn sent to a mill or market; for all these are protected and privileged for the benefit of trade, and are supposed, in common presumption, not to belong to the owner of the house but to his customers."

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(a) 4 T. R. 565.

(b) Page 35.

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Now, the frame in question possesses none of the requisites to bring it within the exception; and all ought to concur. It is true, that these instances put by the text-writers are not to be taken as limiting and comprehending the whole exception, but merely as illustrations; still, however, every instance put is of an article to be operated upon in some way or other, "to be carried, wrought, or managed," and tools and implements of trade are not even *ejusdem generis*. *First*, then, this is not a *valuable thing* within the spirit of the rule. *Secondly*, it is not for the benefit of trade that the workman should work with my tools rather than with his own, or with those hired of another; or that he should work in his room rather than in mine. How does this conduce to the public convenience? The workman has nothing to do with the public; he is to work for his master only. *Thirdly*, the frame is not upon the premises of the tenant by authority of law. It is a mere private contract between the parties. *Fourthly*, the implements by which, and by which alone, a man gains his livelihood, cannot be supposed, in common presumption, not to belong to him. *Fifthly*, it cannot be contended, that the tenant in this case is a person exercising a public trade or employment. The plea discloses that he is merely the workman of the plaintiffs. Now, it is observable upon this point, that the privilege exists in respect of the trade of the bailee merely, though it operates in favour of the owner of the goods. The horse in the shop of a farrier is equally protected though it be the property of one who was never a trader: it is not the interest of the individual which the law consults, but the common good of the public, all of whom may have dealings with the trader. Tried by this test, if the tenant was not a trader, the privilege could not for a moment be supported. *Lastly*, these goods are not delivered to be carried, wrought, or managed. If, therefore, the question were now *res integra*, it would seem that implements were

within neither the letter nor the spirit of the rule. But it is said, that the case of *Rede v. Burley* carries the principle still further. That case has probably been supposed to go further than it really does; for, by the pleadings (a), it appears that the yarn when distrained was upon the shoulders of the owner, and the horse there to carry the yarn, so that, as the case is reported in another book (b), "they were in the possession of the very owner." But it is unnecessary to controvert that case, because, although it was denied by *Walmsley* that a horse carrying corn to market would be privileged, it is obvious that a horse would be so employed *pro bono publico*, and might therefore be privileged; although it is very doubtful whether the privilege would continue whilst the horse was in a private place after having performed its office. Neither is it necessary to controvert the proposition, that, when the delivery of goods is necessary to the carrying on of a trade, they shall be privileged. It is sufficient to answer that no such necessity exists here. But it is asked, upon what principle is the article to be protected, and not the implement? The implement has, as such, a protection *sub modo*. Further it matters not to the public whether a workman works with his own tools, or with borrowed ones; at his own dwelling or at that of his master: the public have no dealings with him; they are excluded by the very terms upon which he engages with his master. The other cases cited have no application to this question, and each comes within the exception. The factor and the wharfinger, in the exercise of public trades, receive valuable things to be managed in the way of their trades. The publicity of the trade, and the necessity of so carrying it on form the grounds of the decision in these cases.

But the question has been expressly decided, and no answer has been given to the cases which bear directly upon

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(a) Cro. Eliz. 549.

(b) Noy, 68.

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the point. It must be admitted, that *Simpson v. Hartop* was decided upon a different ground; but surely it is not, as has been urged, an authority for the plaintiffs in this case. It admits the exception, which is not now denied; but, having noticed the exception, the Court say, that the stocking frame could *only* be privileged as it was an instrument of trade. Money was the consideration for the frame in that case, in this the exclusive employment of the workman; and it is equally in both for the public good that the implements of a man's trade should be protected; because, by taking away his tools, the owner is disabled from serving the commonwealth in his station. It is impossible, however, to distinguish the case of *Gorton v. Falkner* (a) from the present. The same point was made, and the Court could not decide against the plaintiff, without also deciding expressly against the principle now contended for. That case is therefore an express authority for the defendant, unless it can be said that a judgment is to be of no avail, because the Court, thinking the principle contended for clearly untenable, do not even allude to it in their judgment. It is said, however, that the loom, the subject of that action, was not sent with a particular quantity of yarn, to be returned with the yarn when manufactured; but that the contract in that case was, that the frame should be lent upon condition that the workman should work for the manufacturer alone. There, the frame was delivered for a series of jobs; here, for one job only: but that circumstance does not make the delivery less beneficial to the public, upon which ground alone the privilege in the present case is put.

No case has been produced, nor is there a *dictum* to be found, extending to implements of trade this absolute exception. Is it then to be extended to them now for the first time? The policy of the law is opposed to this. Statutes have been passed to enlarge, but never to narrow

(a) 4 T. R. 146.

the landlord's remedy. In all the cases which have arisen upon this exception, the Courts have held the plaintiff strictly to the rule: thus, where a horse was sent saddled to be shod, and the saddle was taken off and laid beside him, it was holden that the saddle was distrainable, because it was not necessary for the shoeing of the horse to send him saddled (a). And in *Fowkes v. Joyce* (b), it was held that cattle going to the *London* market, and put into a close with the consent of the landlord and leave of the tenant to graze for the night, might be distrained by the landlord for rent, notwithstanding it was objected that they were privileged in favour of trade (c). *Francis v. Wyatt* (d), and *Juson v. Dixon* (e).

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Follett, in reply.—The plaintiff is not removed from his original proposition, that articles of trade sent for the purposes of trade are privileged from distress; and to hold the contrary would paralyze this mode of carrying on trade, which is highly beneficial to the public. It is said, however, that this does not come within the instances enumerated in the authorities; but the question is, is it not within the principle? The sole difficulty is, that this is an implement of trade, and as such has a privilege *sub modo*, but notwithstanding it has a privilege *sub modo* if the property of the tenant, still, if the property of a stranger, and upon the premises for the purposes of trade, it may also be privileged absolutely. Again, it is not necessary that the tenant should be the trader: the only question is, whether the article be upon the premises for the benefit of trade. The case of *Rede v. Burley* decides that; for it is

(a) Rolle's Abr. *Distress* (I).

(b) 3 Lev. 260; S. C. 2 Vent. 50; 2 Lutw. 1161.

(c) It is now settled that cattle under such circumstances are not liable to the distress of the land-

lord for rent. *Tate v. Glead*, C. B. Hil. 24 G. 3, 2 Wms. Saund. 290, n. 7.

(d) Bur. 1498; S. C. Bl. Rep. 483.

(e) 1 M. & S. 601.

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impossible to doubt but that the distress in that case was at the house of a private individual. So, the instance adduced of a horse having carried corn to a market being put up in a private stable, is to the same effect; the privilege is not for the benefit of the individual, but because the purpose is connected with trade. In such a case, the question would be, whether the horse was *bonâ fide* upon the premises for the benefit of trade. The chief ground of the argument, *viz.* that the bailee must be a trader, is therefore removed; but, if it were material, the plea states that the tenant was a trader. With respect to the case of *Gorton v. Falkner*, it is sufficient to say that the Court did not notice the point. The facts, however, were not the same, and the Court could not travel out of the record.

Cur. adv. vult.

The judgment of the Court was now delivered by Lord LYNTHURST, C. B.—

This case does not turn upon the privilege of a workman in respect of the implements and machinery by which his trade is to be carried on, but upon the privilege of the person by whom the workman is employed. The plaintiffs, who were the employers, furnished the workman, not only with the materials upon which he was to work, but also with the machinery by which the materials were to be worked up. The question is as to the extent of the employer's privilege; whether it is confined to the materials which he supplies, or extends also to the machinery by which the working up is effected. It appears to me that it is confined to the materials, and does not include the machinery. The instances put in the books, as to this head of privilege, apply to the materials only, and not to the machinery. *Coke*, in his *Commentaries upon Littleton*, s. 47. a., in enumerating the things which are exempt, mentions (amongst others) materials in a weaver's shop, for the making of cloth, but is

wholly silent as to the machinery by which the cloth is to be made. It cannot be said, that, under the term materials, machinery would be included. In *Rede v. Burley* (a), the question was confined to the wool, the material which was spun, and the horse by which it was carried. In *Gisborne v. Hurst* (b), which was considered in the argument as laying down the correct rule, things included under this head of privilege are said to be goods delivered to a person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employment. In *Simpson v. Hartop* (c), the Chief Justice evidently adopts this rule; his second head of general exemption is things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ. In 22 *Edw.* 4, 49, where this privilege is mentioned, the instance put is, "the robe which a man sends to a taylor to make." So, *Broke*, title *Distress*, pl. 42, and *Distress*, pl. 281, mentions horses at an inn, cloth at a tailor's, grain at a mill, *et hujusmodi*, which are there by authority and for the common weal. So again, *Gilbert* (on *Distresses*, 35), says, valuable things in the way of trade shall not be liable to a distress, as, a horse standing in a smith's shop to be shod, or in a common inn, or cloth sent to a tailor's shop, or corn sent to a mill or market; for, all these are privileged and protected for the benefit of trade, and are supposed, in common presumption, not to belong to the owner of the house, but to his customers. This passage is adopted by *Blackstone* (d), and he therefore may be considered as affirming it, and he gives no additional instances under this head. In *Gilman v. Elton*, where the question was, how far the goods of a principal were privileged from distress for his factor's debt, though the instances of materials sent to a weaver and cloth to a

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(a) Cro. Eliz. 549, 596.

(b) Salk. 249.

(c) Willes, 54.

(d) 3 Bl. Com. 8.

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tailor are mentioned, and the rule in *Gisborne v. Hurst* and *Simpson v. Hartop* is approved, there is nothing to carry this head of privilege beyond the materials, and the means of transporting them: there is nothing to extend it to the machinery by which the materials are wrought. The same may be said as to *Thompson v. Mashiter*, where goods were sent to a factor for sale, and were held privileged in the warehouse of the wharfinger where the factor had deposited them till an opportunity for selling them should offer. None of these cases go beyond this, that the material to be worked upon is privileged; that the conveyance by which it is carried to and from the place of manufacture is privileged; that it is privileged in the hands of a carrier whilst he is carrying it, in the hands of a factor to whom it is consigned, and in the hands and warehouse of a wharfinger, where it is lodged and deposited by the factor.

There is no case or *dictum* that the machinery by which it is to be manufactured is included in the privilege. The only colour for including it seems to arise from the use of the word *managed*, in *Gisborne v. Hurst*; but that appears to apply only to the management of the material in its original or wrought state, and to the machinery or engine by which it is wrought. The case of *Gorton v. Falkner* comes so near to the present, and differs from it by such minute points of distinction, that it is a strong authority to shew that the privilege is confined to the material, and that it has been the common understanding that it did not extend under any circumstances to the machinery. It might have been said, in *Simpson v. Hartop*, that it was for the benefit of trade and commerce that the owner of a loom who let it to a workman, should have the privilege of having it protected from distress; and, as that action was brought by the owner of the loom, it is probable that this privilege would have been insisted on had it been thought tenable. That case is important, because

it shews an inclination, at that distance of time, to clothe the machinery with a general and unqualified protection; and yet, from that period to the present, it is singular that the mode pursued in this case, so obvious and simple if available, should never have been adopted. *Gorton v. Falkner* improved upon the attempt made in *Simpson v. Hartop*. The loom was *lent* not *let*, it was not lent for any definite time, so that the owner might resume it when he thought proper, and it was only to be used for the owner. The sole difference between that case and the present is, that the loan in that case was general and not for a particular transaction, and that it is not there expressly stated that the owner of the loom was to find materials. But neither of these circumstances appears to us to make any material distinction. It was there stated that it was customary at *Manchester*, (the place where the looms were distrained), for the employer to lend his workmen looms, without receiving any thing for the use of them, except they were used in weaving worsted tapes. But the loan is equally for the benefit of trade (if benefit of trade be the criterion), whether the looms are employed with the materials of the employer, or with the materials of the workman or of any other person; and there cannot, as applied to this subject, be any real distinction between the use of the loom whilst a supply of materials furnished with it is worked up, and the use of it whilst the owner's pleasure shall continue. If the privilege is to continue till the supply of materials furnished with the loom is exhausted, it will depend upon the extent of that supply how long the privilege will continue. The supply may be sufficiently large to keep the loom employed for a whole year or more, and what is the case as to one loom and the privilege attending it, may be the case as to as many looms as the place in which they are worked may be capable of holding; and the remedy by distress for rent for the use of the premises may be entirely suspended, by the premises being exclusively used

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for privileged articles. Although this may also be the case where the privilege is clear and its extent ascertained, we think it not an immaterial consideration, when the extent of the privilege is the point to be determined. We are, therefore, of opinion that the privilege from distress for rent does not extend to the machinery of the employer, because there is no decision and no *dictum* that such a privilege exists; because it is not necessary for the protection of trade that it should exist; (upon principle, it would equally extend to any machinery lent, though not lent by the employer, and to which, it has been decided that it does not extend); and because the whole premises out of which the rent issued might be exclusively occupied and entirely filled by the machinery for which the privilege is claimed.

Judgment for the avowant.

Follett applied for the costs of the amendment, which *Chilton* opposed, because the amendment had been made at the suggestion of the Court, and was, as he contended, unnecessary.

BAYLEY, B.—The judgment might have been different upon the record as it originally stood. You must pay the costs of the amendment.

SMITH and Others v. CRAVEN and THOMPSON.

Where *A.*, *B.*, and *C.*, not being general partners, entered into a joint speculation, and each was to contribute a third:—*Held*, that *A.*, who had paid his share, was not liable to the bankers of *B.*, for monies advanced by such bankers on the individual credit of *B.*, without the knowledge of *A.*, though such monies were applied in payment of bills drawn upon *B.* in the course of the joint speculation.

ASSUMPSIT for money lent, &c.—Plea by *Craven*, the general issue—Judgment by default against *Thompson*. The cause having been referred to a barrister, he made his award, which was turned, by the direction of the Court, into a special case, containing the following facts:—

his share, was not liable to the bankers of *B.*, for monies advanced by such bankers on the individual credit of *B.*, without the knowledge of *A.*, though such monies were applied in payment of bills drawn upon *B.* in the course of the joint speculation.

On the 11th *October*, 1828, the defendants, *Thompson* and *Craven*, together with one *Wharton*, who were severally merchants in *Hull*, carrying on business separately on their own account and in their own names, engaged in a joint speculation for the purchase and importation of corn from the *Baltic* into the port of *Hull*. For this purpose, they employed *Wharton's* clerk, *Rodbartus*, as their agent, whom they dispatched to *Lubeck*. He purchased several cargoes of corn, which were sent to *Hull*, and consigned to *Wharton*.

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By a letter, dated 11th *October*, 1828, from *Wharton*, *Rodbartus* was instructed that he was to draw upon him (*Wharton*) for what monies he might want, payable in *London*, at two or three months as most convenient. In this letter, *Wharton* says—"You will understand this speculation to be on the joint account of *Wharton*, *Thompson*, & *Craven*," which was the fact.

In the course of this speculation, bills to the amount of 3,696*l.* 17*s.* 8*d.*, were drawn on *Wharton*, and by him accepted payable at Messrs. *Smith, Payne, & Smith's*, the agents of the plaintiffs. All these bills, with the exception of one drawn by a firm of *Julien, Brothers*, were drawn by *Rodbartus*, and they were all duly honored by the plaintiffs on *Wharton's* account and by *Wharton's* instructions. No partnership fund was raised for this speculation, and it was agreed that the parties were to meet the expenses in thirds. The defendant *Craven* was always ready with his advances, and paid his proportions, when called upon, to *Wharton* and *Thompson*, who had the management of the speculation, the corn being consigned to *Wharton*, and *Thompson* acting as salesman. *Craven's* first contribution towards the joint speculation was 100*l.*—on the 28th *November*, 1828. On the 3rd *January*, 1829, there was an excess of bills and other charges payable on account of the joint speculation above the amount of monies in hand. On the 5th, 7th, and 8th of *January*, *Craven* paid several sums of mo-

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ney into *Wharton's* hands as contributions required from him to the joint speculations. On the 21st *February*, 1829, the excess of the bills and other charges payable on account of the joint speculation above the amount actually received on account of the sales, was 2,208*l.* 11*s.* 3*d.* The advances made by *Craven* at the same date to *Wharton*, on account of the speculation, amounted to 796*l.* 10*s.*

Some years before and during the progress of this speculation, and until the close of it, *Wharton* kept an account with the plaintiffs in his own name. They had no knowledge whatever of the corn speculation. *Wharton's* account with them was a general banking account; and they were in the habit of paying on his account through Messrs. *Smith, Payne, & Smith*, their *London* correspondents, bills drawn upon him (*Wharton*) by foreign merchants and others, and by him accepted payable at the house of Messrs. *Smith, Payne, & Smith*.

In the course of the joint speculation, namely, on the 24th *December*, 1828, *Wharton* delivered to the plaintiffs an account of acceptances, with instructions to them to honor the same, which instructions were in the following terms:—

Hull, 24th *Dec.* 1828.

Accepted payable at Messrs. *Smith, Payne, & Smith's, C. F.*

<i>Rodbartus'</i> draft, dated <i>Lubeck</i> , 27th <i>October</i> , at two months, due 30th <i>December</i>	- - - -	£ 300 0 0
<i>Matthew Smith's</i> draft, dated <i>Hull</i> , 2nd <i>September</i> , at four months, due 5th <i>January</i> , 1829.	- - - -	184 0 2

Cr.	375 0 0	<i>Thos. Wharton.</i>	£ 484 0 2
	200 0 0		
	<hr/>		
	£ 575 0 0		

At the same time *Wharton* paid in bills to the amount of 575*l.*; and the sums of 484*l.* 0*s.* 2*d.* and 575*l.* were passed to the debit and credit respectively of *Wharton's* account with the plaintiffs.

On the 2nd *January*, *Wharton* delivered to the plaintiffs an account of acceptances, with instructions in the following terms:—

		Hull, Jan. 2nd, 1829.	Exch. of Pleas, 1831.
Accepted payable at Messrs. <i>Smith, Payne, & Smith's, C. F.</i>			
<i>Rodbartus'</i> three drafts, dated <i>Lubeck</i> , 3rd November, at two months, due 6th January, say—			SMITH v. CRAVEN.
1 Draft for -	- - - - -	£ 350 0 0	
1 do. -	- - - - -	250 0 0	
1 do. -	- - - - -	300 0 0	
<i>Munster, Grafe, & Co's.</i> draft, dated <i>Hambro'</i> , 7th November, at two months, due 10th January.		139 11 5	
		<u>£ 1,039 11 5</u>	

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Cr.				
Cash	-	-	£ 200 0 0	
Bill	-	-	500 0 0	
do.	-	-	427 8 3	
			<u>£ 1,127 8 3</u>	

At the same time, *Wharton* paid in bills and cash to the amount of 1,127*l.* 8*s.* 3*d.*, and the sums of 1,039*l.* 11*s.* 5*d.*, and 1,127*l.* 8*s.* 3*d.*, were passed to the debit and credit respectively of *Wharton's* account with the plaintiffs.

On the 9th January, *Wharton* delivered to the plaintiffs an account of acceptances, with instructions to them to honor the same, which instructions were in the following terms:—

Hull, 9th Jan. 1829.

		Accepted payable at Messrs. <i>Smith, Payne, & Smith's, C. F. Rodbartus</i> , his drafts, dated <i>Lubeck</i> , 10th November—	
Cr.			
£ 176 0 7	1 for -	- - - - -	£ 275 0 0
26 10 0	1 for -	- - - - -	325 0 0
33 5 0	<i>Munster, Grafe, & Co., Hambro',</i> their		
50 0 0	draft, 14th November, two months,		
25 0 0	due 17th January - - - - -		
35 0 0			289 0 0
100 0 0			<u>£ 889 0 0</u>
100 0 0			
100 0 0			
105 0 0			
105 0 0			
35 0 0			
<u>£ 890 15 7</u>			

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At the same time *Wharton* delivered the above, he also paid in bills and cash value 890*l.* 15*s.* 7*d.*, and both sums were in like manner passed to account.

On the 16th *January*, 1829, *Wharton* in like manner delivered to the plaintiffs an account of other acceptances, with the like instructions, of which the following is a copy:—

Hull, 16th *Jan.* 1829.

Accepted, payable at Messrs. *Smith, Payne,*
& *Smith's, Tanner & Beckworth*, their
draft, dated 18th *September*, at four
months, due 21st *January* - - - 173 10 0

C. F. Rodbartus' 5 drfts. dated *Lubeck*, 17
Nov., at 2 mos., due 20 *Jan.*—

Bill	191 18 0	<i>viz.</i> 1 for	28 0 0	
	471 10 0	1 for	260 0 0	
Cash	300 0 0	1 for	240 0 0	
	60 2 0	1 for	200 0 0	
	100 10 0	1 for	156 12 8	884 12 8

£ 1,124 0 0	<i>John Sugmund Munn, Lubeck</i> , his draft, dated 17 <i>Nov.</i> , 2 months, due 20 <i>Jan.</i>	68 8 10
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<i>Thos. Wharton.</i>	£ 1,126 11 6
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And, at the same time, *Wharton* paid in bills and cash, value 1,124*l.*, and both were in like manner passed to account.

On the 21st *February*, 1829, *Wharton* in like manner delivered to the plaintiffs an account of other acceptances with the like instructions, of which the following is a copy:

Accepted, payable at Messrs. *Smith, Payne, &*
Smith's, Julien, Brothers, Copenhagen, their
drafts, dated 22nd *Nov.*, at 3 months, due

100 0 0	25th <i>Feb.</i> <i>viz.</i>	
300 0 0	One for - - - - -	600 0 0
471 15 0	One for - - - - -	412 5 0
198 14 0		
£ 1,070 9 0		£ 1,012 5 0

Thos. Wharton, Hull, 21st. *Feb.*

And on this last occasion, *Wharton* paid in bills and cash, value 1,070*l.* 9*s.*, and both were in like manner passed to the account.

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In all these instances except the last there were other acceptances included in the instructions besides those relating to the corn speculation. All the acceptances made payable at *Smith, Payne, & Smith's*, were duly honored by the plaintiffs on *Wharton's* account. At the time of the above transactions, the plaintiffs believed the above-mentioned acceptances to be *Wharton's* individual concern. In the payment of 1,127*l.* 8*s.* 3*d.*, made by *Wharton* to the plaintiffs, on 3rd *January*, 1829, was included a bill drawn upon and accepted by the defendant *Thompson*, for 427*l.* 8*s.* 3*d.*, due 29th *March*; and in the payment of 1,070*l.*, made by *Wharton* to plaintiffs, 21st *February*, 1829, was included a bill for 198*l.* 14*s.*; these two bills were entered as bills to their full amount by the plaintiffs, who did not negotiate them, and in whose hands they still remain unpaid. Both these bills were drawn by *Wharton* on *Thompson*, and were accommodation bills manufactured between them, without the privity or authority of *Craven*, and having no other reference to the joint concern, than so far as it might be presumed to be for the purpose of enabling *Wharton* or *Thompson*, to raise money to pay their respective contributions. The plaintiffs did not know that the bills drawn by *Wharton* on *Thompson* were accommodation bills. On the 11th *April*, 1829, *Thompson* became a bankrupt, and about the same time *Wharton* absconded to *America*, and also became bankrupt. Since the bankruptcy of *Thompson* and *Wharton*, defendant *Craven*, including what he had previously paid towards the joint account, amounting to 796*l.* 10*s.* has been called upon and obliged to pay 2,900*l.* The whole of the several cargoes of corn came to the hands of *Wharton* or *Thompson*, or *Wharton's* and *Thompson's* assignees, and were sold by them, except one cargo, which was lost at sea—uninsured. The plaintiffs first discovered the corn speculation between

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Wharton, Thompson, and Craven, under the bankruptcy of *Wharton*. Independently of the sum of 626*l.*, for which this action is brought, *Wharton* still continues indebted to the plaintiffs in the sum of 324*l.* 14*s.* 9*d.* Up to 21st *February*, 1829, the amount of the monies advanced by plaintiffs to *Wharton*, which can be traced to the joint speculation, was, 3,816*l.* 13*s.* 2*d.*; and the amount of similar monies received by the plaintiffs from *Wharton* up to the same date, exclusive of the two bills drawn by *Wharton* on *Thompson*, as above mentioned, was 3,070*l.* 7*s.* The case then set out the accounts of *Wharton* with the plaintiffs, from the 15th *November*, 1828, to the close of the account, copied from *Wharton's* pass book.

R. C. Hildyard, for the plaintiffs.—The plaintiffs claim the sum of 626*l.* 2*s.* 3*d.*, which is part of a cash balance against *Wharton*, and for which he had given the two dishonored bills as collateral security. They seek to charge the defendant *Craven* with this sum as a partner, not on the score of having given him credit, but on the ground that he was a party interested in the profit and loss on the transactions out of which the balance in favour of the plaintiffs arose. The two defendants and *Wharton* were engaged in a joint speculation, and they appointed *Rodbartus* as their agent to conduct this speculation. It is expressly stated in the case that there was no partnership fund, and therefore it was necessary that *Rodbartus* should raise the money required for the purposes of the speculation by drawing bills; and accordingly he drew bills to the amount of more than 3,000*l.* But *Rodbartus* was not only authorized by the necessity of the case, but he had an express authority as agent to draw upon *Wharton*, and he was at the same time informed that the speculation was on the joint account of the three, which is found by the case to have been true. The defendants therefore were connected with these bill transactions; and as far as these bills are concerned, *Wharton* may be considered as the firm of the

three joint speculators; for *Rodbartus* was instructed to draw on *Wharton*, for the purposes of the joint speculation. *South Carolina Bank v. Case* (a) is in point. There, the indorsement of the partner resident in *America* was held to be the indorsement of the firm in *England*, and to bind the partners in *England*.

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[*Bayley, B.*—In the *South Carolina Bank v. Case*, the Court of *King's Bench* thought that *James Butler Clough* had virtually an authority to pledge the credit of the firm by an indorsement in his own name. That portion of the business of the house which was carried on in *America* was carried on in his name.]

Wharton's acceptances in the present case were the acceptances of the firm, and the advance of money by the plaintiffs to take them up, was a lending and advance of money to the three. Again, it is clear that these bill transactions were merely a mode of paying the agent abroad, who might have sued each individual of the three. This therefore was an advance to all.

[*Bayley, B.*—If you advance for the use of all at the instance and upon the credit of one, can you sue all?]

All the partners appear to have acquiesced in this mode of paying the agent. In *Denton v. Rodie* (b), one of several partners, with the privity of the others, drew bills in his own name upon the partnership, in favour of persons who advanced him the amount, which he applied to the partnership use; and Lord *Ellenborough* held, that, though the members of the partnership were not liable on the bills, they were liable as being jointly indebted to the same amount, as for money lent, or money had and received.

[*Bayley, B.*—Because it was considered that a virtual authority to raise money was to be inferred from the course of dealing abroad, which was adopted by the partners in this country. The plaintiffs in this case are merely the agents of one of the buyers. Can they be said to have furnished money for the use of all, at the instance of all?]

(a) 8 B. & C. 427.

(b) 3 Camp. 493.

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The defendants adopted all *Wharton's* transactions. They made some payments. It does not appear that the defendant *Craven* was ignorant that *Wharton* carried on these transactions by means of advances from the plaintiffs. The three joint speculators were saved, by these very advances, from being sued for the corn by the sellers, who had a clear right of action against them for the amount.

Coltman, for the defendant *Craven*, was stopped by the Court.

LORD LYNTHURST, C. B.—It was agreed that each of these three persons should contribute a third, for the purposes of this joint speculation. It is expressly found by the case, that *Craven* did contribute his share. Nothing is stated on the case which tends to shew that *Craven* knew how the other two-thirds were raised by *Wharton* and *Thompson*, his partners in this transaction. How could he know that they did not meet their shares with funds of their own? He might suppose that *Wharton*, to whom the corn was consigned, might raise his share on the security of the proceeds. In point of fact, *Wharton* raised the money from the plaintiffs on his own credit, but it does not appear that he had *Craven's* authority for so doing, nor is it found that *Craven* had any knowledge of his proceedings in this respect.

BAYLEY, B.—If I supply my agent with money, which he misapplies, and raises money elsewhere, can the person, from whom he obtains the money, sue me for the amount? If this had been a claim by the seller of the corn, no doubt he would have been entitled to proceed against all the parties, and might have called upon them all for payment. It is not a claim by the seller, but by the person who, as between the parties themselves, is the mere hand by which the money is advanced. *Wharton* having given collateral security, the plaintiffs, as his agents and on

his credit, not knowing anything of the other parties, pay the money, and pay it in discharge of that which is the individual debt of their principal, and of him alone. As agents they had no notice that they made the payment, except on the individual behalf of *Wharton*; he only was trusted, and the advances were made on his credit alone; the plaintiffs were not deluded by the prospect of a partnership security, and the claim must be restricted to *Wharton* alone. See what a situation the defendant *Craven* would be placed in were it otherwise; he was justified in supposing that *Wharton's* share was raised out of his own funds. He finds that all the bills are honoured when they became due, with funds which he would naturally conclude were really the funds of *Wharton*; and to my mind, it would be most unjust if, after a lapse of time, *Craven* having settled the full amount of what, as between himself and *Wharton*, he was bound to pay, a third person were allowed to come forward and say, "I advanced the money on the credit of *Wharton* only, but I find that it was applied in payment of your liabilities, and therefore I look to you." A party is not liable as a partner, except he give to his partner express or implied authority to pledge his credit in the transaction out of which the claim arises. Now, what authority does *Craven* appear to have given to *Wharton* to borrow this money from the plaintiffs? It is not sufficient to say, that *Craven* was relieved from a liability; for, your payment of my debt does not make me your debtor, unless the payment be made at my request. The partnership was not liable unless *Wharton* had an authority from them to borrow; and no such authority, express or implied, exists in the present case.

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The rest of the Court concurred.

Judgment for the defendant *Craven* (a).

(a) In the event of a decision for the defendant *Craven*, the plaintiffs were to pay the costs of the reference and award; and, upon

the application of *Coltman*, the Court directed that they should also pay the costs of the special case.

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DUCKETT, Bart. *v.* WILLIAMS.

Under the 4th section of the statute 1 *W.* 4, c. 22, the power of the Courts at *Westminster* to issue commissions for the examination of witnesses abroad, is not confined to cases where the witnesses reside within the King's dominions.

AFTER plea pleaded, but before issue was joined, *R. V. Richards* for the defendant, upon an affidavit that material witnesses resided in *France*, obtained a rule, under the stat. 1 *W.* 4, c. 22, s. 4, to shew cause why a commission should not issue to examine witnesses in *France*, and the trial of the cause be stayed until the commission should be returned.

Sedgwick shewed cause and contended, that the authority of the Court under the 4th section of the statute was by the first section confined to cases where the witnesses resided within the King's dominions; and that this was manifest from the wording of the first section, which confined the authority to places within the King's dominions, but extended it to all causes of action wheresoever the same might arise, provided the action was commenced in the Courts at *Westminster*.

Richards, contra, submitted that the object of the statute was to enable Courts of common law to do that which formerly could only be done through the intervention of a Court of equity; that the first clause extended the provisions of the stat. 13 *Geo.* 3, c. 63, to other parts of his Majesty's dominions, and the fourth vested in the Judges a discretionary power to issue a commission to other countries. He mentioned the case of *Shovey v. Shibelli* (a), in which the Court of *King's Bench* had issued a commission for the examination of witnesses in *France*.

BAYLEY, B.—It is very desirable, particularly in cases upon policies of insurance, that the Courts of common law

should have the power of issuing commissions for the examination of witnesses into all countries; and with a view to confer this power upon Courts of law, the statute in question was passed. By the stat. 13 *Geo. 3*, c. 63, s. 44, power is given to any Court, in which an action is depending, to provide and award a writ in the nature of a *mandamus* to the Judges in *India* for the examination of witnesses. Under that statute the *mandamus* issues to the Judges, and, having that provision in view, this statute, by the first section, extends that provision to all places within his Majesty's dominions. Under the first section, a writ in the nature of a *mandamus* must be directed to the Judges within his Majesty's dominions. Now, if it were intended to confine the act to places within his Majesty's dominions, the first section would seem to be an adequate provision, and there would be no occasion to make provision for the examination of witnesses under any other commission. But the fourth section provides, that it shall be lawful to and for each of the Courts at *Westminster*, &c., to order a commission to issue for the examination of witnesses on oath, at any place or places out of the jurisdiction of the Court where the action shall be depending. Why is a limited construction to be put upon these words, or why should the words 'at any place or places' be limited to places within his Majesty's dominions? If the necessity of the case, or natural justice, required it, of course it would be the duty of the Court so to control the general import of these words. But does natural justice require it? Is it not expedient that the Court should have the power of examining witnesses who may not be within his Majesty's dominions? Suppose an insurance to be made upon the life of a person resident abroad: if it were necessary to prove that the life was insurable, to whom would you resort but to persons resident abroad? and yet such persons could not be compelled to come to this country to be examined. Again, if a foreign ship be insured in this country, or a ship be lost

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on a foreign coast, the testimony of witnesses resident abroad may be desirable, and yet there may be great difficulty in obtaining the testimony of such witnesses, if a narrow construction be put upon this statute. It seems to me that the act would fall short of the beneficial intention of the Legislature, to be gathered from its language, were we to say that it was confined to the examination of witnesses in places within his Majesty's dominions. The act may not be obligatory, and the Court may exercise a discretion, to be regulated by the circumstances of each case, whether it will issue a commission; but I do not think that the power of the Court to issue a commission is confined to places within his Majesty's dominions. We are confirmed in this construction by the course which has been adopted by the Court of *King's Bench*.

GARROW, B., was of the same opinion.

VAUGHAN, B.—I consider this to be a remedial law, and that, as such, it should be construed largely. Indeed, the provisions of the 4th section would be nugatory, did they not apply to a case like the present. The 1st section provides for all places within his Majesty's dominions; but the 4th vests in the Judges a discretion to issue a commission to any place or places out of the jurisdiction of the Court. The issuing of the commission must depend upon the discretion of the Court. But to say that the 4th section only extends to places within his Majesty's dominions, would defeat the plainly expressed intention of the Legislature.

BOLLAND, B.—I entirely agree with the rest of the Court. It is impossible not to see that the policy of this act is to avoid the difficulty in which parties formerly were, who were desirous of examining witnesses abroad. Before this statute, the examination could only be obtained

(except by consent) through a Court of equity; and if the defendant were desirous of obtaining the examination, he must have moved to stay the trial in the Court of law. I am aware of the difficulty of executing such commissions, and of examining witnesses abroad; but it frequently happens, that witnesses who are unwilling to visit this country, may be ready to give their testimony if examined abroad; and the parties are not, merely on account of the difficulty, to be deprived of their legal rights.

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Rule absolute (a).

(a) The terms were to be settled by the counsel, and if they could not agree, a further application was to be made to the Court.

See the form of the affidavit, order, and commission. *Price, Pract. App.* 559—568.

SIMONS v. FOLKENHAM.

THIS was a country cause, in which issue was joined in *Hilary* Term, but no notice of trial was given for the ensuing assizes. A rule *nisi* for judgment as in case of a nonsuit having been obtained in this term—

Where issue is joined in an issuable term in a country cause, and no notice of trial is given for the ensuing assizes, the defendant cannot move for judgment as in case of a nonsuit, until the term next after the second assizes.

Sir *William Owen* shewed cause, and contended, that the motion was premature. He cited the case of *Redward v. Way* (a), and the rule of Court, *Easter* Term, 1824 (b), by which it is ordered that no rule for judgment as in case of a nonsuit be granted in the next term after issue joined, unless the plaintiff has given notice of trial, and neglected to proceed to trial; and contended, upon the authority of *Crowley v. Dean* (c), and *Spiers v. Parker* (d), that the

(a) 13 *Price*, 453.

(b) *M'Clel.* 708.

(c) *Ante*, p. 18.

(d) *Ib.* n.

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plaintiff had been guilty of no default, issue having been joined in *Hilary* Term, an issuable term, and no notice of trial given for the next assizes.

BAYLEY, B.—If issue is joined in the term immediately before the assizes, and a rule of Court directs that judgment as in case of a nonsuit shall not be granted in the next term after issue joined, unless notice of trial has been given, it is clear, upon every principle of common sense, that judgment as in case of a nonsuit cannot be moved for in a country cause, where no notice of trial has been given, until the term after the second assizes. The rule means, that you cannot move for judgment as in case of a nonsuit, where no notice of trial has been given, in a town cause, until the second term after that in which issue is joined; and, in a country cause, until the term after the second assizes after issue joined.

Rule discharged, with costs.



PAGE v. CAREW.

A *subpoena*, tested the 9th *May*, and served on the 19th, required the defendant to appear "on *Monday*, the 21st day of *March* instant;" —The Court refused to set aside the service.

JOHN JERVIS moved to set aside the service of the copy of the *subpoena* in this cause. The process was tested the 9th *May*, was served upon the 19th of the same month, and required the defendant to appear before the Barons on *Monday*, the 21st day of *March* instant.

Per Curiam.—The process cannot mislead; in its present form it is inconsistent, but if the words "of *March*" be rejected, it will stand, that the defendant is to appear on the 21st instant, which, by reference to the *teste*, is the month of *May*. The word instant could not be rejected, because the 23rd of *March* is not in term.

Rule refused.

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DOE d. LEWIS v. THOMAS PREECE.

EJECTMENT. The tenants in possession were *C. Preece* and *T. Mutlow*, who were served with declarations in ejectment, and appeared; but the defendant was afterwards permitted to come in and defend as landlord. *C. Preece* had been in possession of all the property for nearly forty years, up to the year 1826, when she let a part to *Mutlow*. When the cause was tried, at the last *Lent Assizes* for *Herefordshire*, before Mr. Justice *Park, Godson*, for the defendant, proposed to call the tenants in possession to prove an adverse possession against the lessor of the plaintiff; but the competency of these witnesses was objected to, because, by giving evidence for the plaintiff, they were upholding their own possession; *Doe d. Foster v. Williams* (a); and also, because, being identified with the defendant, a judgment against him would be evidence against them in an action for mesne profits, particularly in the case of *C. Preece*, who held the whole property until the year 1826. The witnesses were rejected, and the lessor of the plaintiff had a verdict.

Upon the trial of an ejectment, the landlord (defendant) proposed to call the tenants in possession of different parts of the property, upon whom ejectments had been served, to prove an adverse possession; but they were held to be incompetent: and the Court refused to enter into the question, whether they were competent to prove the possession of each other, because the distinction had not been pointed out at the trial, but intimated an opinion that they were not competent for any purpose.

In *Easter Term*, *Godson* obtained a rule *nisi* for a new trial, contending, that, as the landlord was the only defendant on the record, the tenants were admissible, at least to prove the possession of each other, as they could only be liable respectively for the mesne profits of that part which each held.

Russell, Serjt., who was to have shewn cause with *Talfourd*, after stating that it was proposed to examine the witnesses without any qualification, was stopped by the Court, who called upon—

(a) Cowp. 621.

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Godson, to support his rule.—He admitted that, although he intended to confine the testimony of the witnesses to the occupation of each other, and did not intend to examine them as to their own occupation, he had not drawn the attention of the learned Judge to that distinction.

LORD LYNTHURST, C. B.—If you did not, at the trial, state the distinction which you now say was passing in your mind, you cannot make that distinction the ground for a new trial. You should have stated at the trial the mode in which you proposed to use the evidence of the witnesses.

BAYLEY, B.—You cannot call a person as a general witness, and afterwards, upon his rejection, say that he was intended for a particular purpose only. However, no injustice is done to the defendant; for, in reality, these witnesses were identified with the premises and with the defendant, and, being tenants in possession at the time the ejectment was brought and served, the judgment in ejectment would be evidence against them of the title of the lessor of the plaintiff, in an action for mesne profits.

Rule discharged.

ANONYMOUS.

Bail who live within ten miles of the city of London or Westminster, must justify in person, and not by affidavit.

RICHARDS moved to justify bail by affidavit. One of the bail was described as residing in *Somers Town*.

Sir *W. Owen* submitted that the bail should justify in person, and referred to the stat. 4 *W. & M. c. 4, s. 2*.

The Master said, that the practice was conformable to the statute; and upon payment of costs further time was allowed for the bail to justify in person.

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THOMAS v. ELDER.

THE *venire facias ad respondendum* in this case was returnable on the 23rd May. The defendant resided in *Middlesex*. On the 25th, *White* moved for a *distringas*, which was granted. The officer hesitated to issue the writ. According to the old practice, before the stat. 7 & 8 Geo. 4, c. 71, s. 5, the defendant had four days from the return of the *venire* to appear, after execution of the process of *venire*, either by personal service of the Sheriff's warrant or summons on the party, or by leaving it at his place of abode: by the statute, where the defendant is served personally with the *venire*, he has eight days to appear after the return thereof: and the doubt was, whether four or eight days should elapse after the return of the *venire* before the *distringas* under this statute issued; or whether the *distringas* might issue immediately, upon the return of the *venire*.

Quere, whether a *distringas* under the statute may issue immediately upon the return of the *venire*.

Semble, that the time within which a *distringas* may issue after the return of the *venire*, is in the discretion of the Court.

White contended, that, upon the terms of the statute, it might issue immediately; and that the words "within eight days after the return thereof," applied to the return of the *distringas* and not to the return of the *venire*, which could not be personally served.

BAYLEY, B.—The meaning of the statute may be this—where the defendant is personally served with original process, the plaintiff may, if the defendant does not appear within eight days, appear for him; or, if a *distringas* issue under an order of the Court, and be executed, then, within eight days after the return of the *distringas*, the plaintiff may appear for the defendant: *reddendo singula singulis* eight days after the return of process personally served, and eight days after the return of the *distringas*. Before the

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statute, the defendant was summoned, and the *distringas* could not issue till four days after the return of the *venire*. The statute, however, is not obligatory upon the Court. It leaves them to exercise a sound discretion; and, if they think the plaintiff comes too hastily, they may delay the *distringas* for a reasonable time. I do not however think it necessary to lay down any general rule, because I think that the time within which the *distringas* should issue is a matter properly within the discretion of the Court. If the defendant is served personally, the plaintiff may enter an appearance within eight days; but, if he keeps out of the way, he may in one view of the case gain additional time. We do not propose to give any opinion now upon this point, because it is, with several others, under the consideration of the Judges of the Court; but the *distringas* in this case may now issue, this being the eighth day after the return of the *venire*.

Rule accordingly (a).

(a) No opinion was expressed upon this point during the term.



FIELD v. RADDEN.

Time of issuing
a *distringas*.

IN *Michaelmas* Term, *John Jervis* obtained a *distringas* before eight days after the return of the *venire*. The officers would not draw up the rule; and now, the eight days having expired, he moved, that the *distringas* might issue, with a view to obtain the opinion of the Court as to the time when the *distringas* might be issued.

The branch of the 5th section of the statute 7 & 8 *Geo.* 4, c. 71, which gives the *distringas*, imposes no limitation as to the time within which the *distringas* is to issue. Eight days must elapse before an appearance is entered;

but that must mean after the return of a writ personally served, or of the *distringas* issued under the former branch of the section; for, otherwise, a party who fraudulently keeps out of the way, which the issuing of a *distringas* assumes, would be in a better situation than a party personally served; for, he would have either twelve or sixteen days to appear, according as the Court should adopt the ancient practice of proceeding by *venire* or *distringas*, or what is said to be the construction of the act of Parliament.

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Per Curiam.—The eight days have expired, and the writ may now issue. It is reasonable that the defendant should have some time to appear; but we will not now express any opinion upon the construction of the statute.

Rule accordingly.



HAWKES and Another, Assignees of STEPHEN DUNN, v.
SAMUEL DUNN.

TROVER for bacon. At the trial, before *Taunton, J.*, at the last *Lent* Assizes for the county of *Somerset*, the following appeared to be the facts of the case:—The plaintiffs were assignees of *Stephen Dunn*, under a commission of bankrupt, dated 18th *May*, 1830, and the assignment to them was dated 18th *June*, 1830. The bank-

The agent of a bankrupt who has made himself responsible for the price of goods, may stop them *in transitu*. But if, after they have reached a certain place, he give them a new

destination in furtherance of the bankrupt's business, and in the course of the bankrupt's trade, when they arrive at the place of such destination, they vest in the bankrupt, and pass to his assignees.

A defendant received from *A.* some bacon, really the property of a bankrupt, and the messenger under the commission asked him if he had not got some bacon of the bankrupt; to which he replied that he had some belonging to *A.*; upon which the messenger desired him to take care of it, and not part with it, as more would be heard of it. Afterwards the defendant allowed the bacon to be returned by *A.* to the person from whom *A.* had received it:—*Held*, that this was evidence of a conversion.

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rupt had removed from *Wiveliscombe* to *Exeter* about the year 1823. He changed his residence six or seven times, and carried on different trades in *Exeter*. In the month of *June*, 1829, he removed to a shop in *Fore Street, Exeter*, to which his son *Edwin* and his daughter *Anne* had removed a few months before, and in which the business of a cheese, bacon, and flour shop was carried on, the name of *E. Dunn & Co.* being over the door. *Edwin* was aged eighteen, and *Anne* twenty-two.

It appeared that one *Shepherd*, a provision dealer and grocer at *Plymouth*, at the end of 1829, and through 1830, had supplied *Edwin Dunn* with bacon. On the 1st *June*, 1830, he sent him the two bales of bacon in question, by the waggon from *Plymouth*, directed to *E. Dunn & Co., Exeter*. This bacon arrived at the waggon warehouse at *Exeter*, but never was taken to the *Fore Street* shop. *E. Dunn* met it at the waggon office, and his father being then in prison, he sent it on to his uncle, the defendant, at *Wiveliscombe*; at which place, it appeared, that *E. Dunn* had before obtained some orders for bacon. The messenger under the commission went, on the 8th *June*, to the defendant at *Wiveliscombe*, and told him, that he came for some bacon which had belonged to *Stephen Dunn*, the bankrupt, and asked him if he had not got it. The defendant said that he had some, but none that belonged to *Stephen Dunn*; it had come from *Edwin's* and *Anne's* shop in *Exeter*. The messenger told him to take care of it, and not to part with it, as more would be heard of it; and told him who he was, and shewed him his warrant. The messenger went again to the defendant's on the 29th, and asked him again for the bacon. He then said, that he had sent it back to the place from whence it came. In point of fact, the bacon had been sent back to *Exeter*, and *Shepherd*, the vendor, had obtained possession of it at the waggon office at *Exeter* on paying the carriage.

The defence being that the shop was *bond fide* carried

on by the children of the bankrupt, the learned Judge left that point, on the facts, to the Jury, holding that what took place at *Wiveliscombe* was a sufficient conversion, and telling the jury, if they thought the business and stock in trade in the shop in *Fore Street* were really the property of *Stephen Dunn*, that they ought to find for the plaintiffs.

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The Jury having found a verdict for the plaintiffs, damages *8l.*, *Wilde*, Serjt., in *Easter Term* last, obtained a rule for a new trial, on two grounds—*first*, that there was no conversion; and *secondly*, that, as the bacon had never been delivered at the shop, and had been supplied on the credit of *E. Dunn*, and had received a new destination from *E. Dunn*, it could not pass to the assignees; or, at least, they could not claim it without indemnifying him. On the first point, *Alexander v. Southey (a)*, *Green v. Dunn (b)*, and *Wilson v. Anderton (c)*, were cited.

Crowder and *Follett* now shewed cause.—On the evidence in the cause, the Jury entertained no doubt but that the property and business in the shop belonged to the bankrupt, and that the possession and apparent ownership of the children were colourable and fraudulent. Then, what was there to distinguish the bacon in question from that in the shop? The whole was in the order of the bankrupt; and *Edwin*, the son, merely acted as his father's agent. He forwarded the bacon exactly as his father would have done, and in pursuance and furtherance of the business of the shop. It was in evidence, that *E. Dunn* had been before over at *Wiveliscombe*, and had obtained orders for bacon. *Secondly*, the learned Judge was right in considering that the facts proved amounted to a conversion. The messenger shewed the defendant his warrant, and demanded the bacon; and when the defendant said that it had come from

(a) 5 B. & A. 247. (b) 3 Camp. 215, n. (c) 1 B. & Ad. 450.

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the shop of *Edwin* and *Anne*, the messenger desired him to take care of it and not to part with it, as more would be heard about it. When the messenger returned subsequently, he found that the defendant had sent it away. Surely, if the demand and the conduct of the defendant on the first occasion did not amount to a conversion, the subsequently parting with the bacon, after notice, was a conversion. It was put by the other side, that he wished to have nothing to do with it, and that he could not be made a bailee against his will. He must, however, take the consequences, if he choose to take upon himself to decide the question of property. He receives the goods from the bankrupt, and he chooses to take upon himself the disposition of them. In the present case, there was not merely a conversion proved by demand and refusal (a), but there was an actual disposition of the property. *Alexander v. Southey*, which was cited when this rule was obtained, is not at all applicable.

[*Bayley, B.*—In that case the servant had no possession].

[*Bolland, B.*—Mr. Serjt. *Wilde* contended, that the defendant could not be made a bailee against his own consent].

There is no evidence of any expression of dissent on such ground. The defendant did not qualify his refusal in any reasonable way. If, on the demand being made, he did not choose to be a bailee, he should have given them up, or, at least, have given some reasonable excuse for refusing. He might at least have said, that he would not hold the property; but he acquiesced in the direction of the messenger to take care of and keep the bacon, and

(a) *Baldwin v. Coles*, 6 Mod. 212; *Wilson v. Anderton*, 1 Barn. & Ad. 450; and note to *Wilbraham v. Snow*, 2 Saund. 47 g, were cited.

then he took upon himself to decide the question of property, and disposed of the goods.

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Erskine and *Bere* in support of the rule.—The defendant had a right to return this property to the person from whom it had been sent. There was no conversion proved at the trial, and the question as to the property in the bacon was not properly left to the Jury. It did not follow of necessity, that, because the property in the shop belonged to the father, the bacon in question also belonged to him. That question, therefore, should have been left to the Jury. Whilst the goods were in the uncle's hands, he held them as agent of *Edwin*, who had a clear lien for the price, for which he had, as agent for his father, rendered himself responsible. *Edwin* never parted with the possession so as to divest this lien, which he was entitled to retain, until the goods reached the purchaser. The defendant held them as his agent, and might insist upon his rights, and return the goods to him. The goods had never gone out of the possession of *Edwin*; for, the possession of the defendant was his possession. Then, as to the conversion, the defendant could not be made a bailee against his will. There could be no conversion unless it had been the duty of the defendant to keep the goods. He was not bound to obey the direction of the messenger, and he never assented to it. He was not a bailee for value, which distinguishes this case from that of *Barclay v. Devereux* (a), where the warehouseman, a bailee for value, had misdelivered goods contrary to the knowledge which he ought, in point of law, to have had, and the Court held that the misdelivery was not an innocent one. The present was an innocent delivery within the principle of that case, and did not amount to a conversion.

(a) 2 B. & A. 702.

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Lord LYNTHURST, C. B.—I am of opinion that there ought not to be a new trial in this case. We must assume from the evidence and the finding of the Jury in this case, that the business in the shop was carried on by the children for their father, the bankrupt, and that the goods in question were ordered for the father by the son, as agent for his father, and consequently, in point of law, that they were ordered by the father, and they were so ordered that they might ultimately be forwarded to *Wiveliscombe*, for the purposes of the father's trade. I thought, on the first view of this case, that *Edwin Dunn* had, for the purpose of protecting himself, given a new destination to these goods; and, if the facts of the case had borne out that view of it, I might have been of opinion that he had a right so to protect himself: but it appears that this bacon was forwarded from *Exeter* to *Wiveliscombe* in pursuance of the intention with which it was purchased. It reached its destination; and then it must be considered as having been delivered to the defendant at *Wiveliscombe* by the father, and all control over it by *Edwin Dunn* was at an end.

As to the second point, it is said that there was no conversion. In consequence of the bankruptcy having transferred the property to the assignees, the messenger goes to the defendant. He does not, as I understand the evidence, distinctly demand the goods; perhaps he had no means of immediately carrying them away. Having ascertained, however, that the goods were in the defendant's possession, he shews him his authority, and gives him notice not to part with the bacon. It might, perhaps, have been competent to him to have refused to keep, or to have any thing to do with it, and, had he done so, the messenger would probably have seized the goods; but he makes no such refusal, and we may therefore presume that he acquiesced. Afterwards, however, on the application of *Edwin*

Dunn, he takes upon himself to deal with the property, and to determine the right to it, and he sends it back. I think, therefore, that these facts afforded strong evidence of a conversion; and that the rule for a new trial ought to be discharged.

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BAYLEY, B.—I agree that this rule ought to be discharged. In the first place, I am of opinion that the property had duly vested in the father. It appears from the evidence, and is found by the Jury, that the business was the business of *Stephen Dunn*, the bankrupt. *Edwin Dunn* represented that the business was his; but the Jury were of opinion that it was the father's. The son, in his evidence at the trial, did not make any difference between this and the other property in the business, but he treated all as standing on the same footing. Therefore, the learned Judge was perfectly right in not making any difference between this and the other property.

The goods in question were originally sold on the credit of the son, according to what appeared to be the usual course of the business. They were originally directed to *Exeter*; when they arrived at that place, they received a new destination, and if it had appeared that *Edwin* had given to the property a new direction, adversely to his father, and for his own protection, I should have thought him justified in so doing, and that he would have been protected; but, instead of that, the new direction was given in furtherance of the business of the shop. Thus, *Edwin* appeared to act in this transaction as the agent of, and for the benefit of his father, and the property vested in the father.

Was there then evidence of a conversion to go to the Jury? It appears that the messenger under the commission went to the defendant, and asked him, "have you not got some bacon, the property of *Stephen Dunn*." The defendant says, "No, but I have some of *Edwin* and *Anne*

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Dunn's." The messenger then shewed his warrant, and desired the defendant not to part with the bacon. Now, if the defendant had said, "I received this bacon from other persons, and can only part with it to them," the messenger would possibly have seized it. He may, therefore, fairly be considered as having agreed that it should remain in his keeping. Afterwards the messenger applies again, and the defendant tells him that he has delivered the bacon back to the parties from whom he had received it. This conduct was quite inconsistent with the undertaking to keep it, which may be fairly implied from his silence; and I am of opinion, therefore, that the present rule should be discharged.

VAUGHAN, B.—This is an action of trover brought by the assignees of a bankrupt, to recover the value of two bales of bacon; and it is necessary that the plaintiffs should make out their property in the goods, and shew that the defendant converted them. With respect to the question of property, the struggle at the trial was, whether the business belonged to the bankrupt or to his son *Edwin Dunn*. Such a case is always one of great suspicion; and here it should be remembered that the father was in prison. The verdict was only for 8*l.*, and therefore the Court would not interfere unless there were misdirection. The Jury thought that the business belonged to the father, and the evidence appears to have been sufficient to warrant them in so finding.

The bacon appears to have been bought on the credit of the son. Admitting that the son had pledged his credit, the question is, whether, on receiving the goods at *Exeter*, he did not cease to act as the purchaser, and begin to act as the agent of his father. Then, in pursuance of orders he had before obtained, he sent the goods to *Wiveliscombe* in furtherance of the business of the shop. This is consistent with his sending them on for his father.

It appears to me also, that there was evidence of a conversion. It would not be too much, perhaps, to say, that there was evidence of a demand and refusal. The messenger came for the bacon, and told the defendant so; and I do not know that any formal demand was necessary. However, the defendant afterwards parts with it out of his possession, with notice of the plaintiff's title; and that was clearly evidence of a conversion.

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BOLLAND, B.—My only difficulty has been as to the conversion. The other points of the case have been settled by the finding of the Jury. I do not find enough to satisfy my mind that there was a demand and refusal on the occasion of the messenger first going over to the defendant. As to what happened on the second occasion, it has been put, that a man cannot be made a bailee against his will; and, if the defendant in this case had stood on that ground, and had told the messenger at the time that he would have nothing to do with the goods, I should have thought that there was a great deal in that argument. But, when the messenger demanded the goods, the defendant lulled him into security, and led him to believe that he would act as a warehouseman or bailee; and I am of opinion that his parting with the goods after such acquiescence was evidence of a conversion by him; and, therefore, that this rule should be discharged.

Rule discharged.

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A., tenant for life, remainder to *B.*, his wife, for life, remainder to the heirs of the body of *B.* by *A.* to be begotten: *C.*, the issue of *A.* and *B.*, in their lifetime, levies a fine *come ceo &c.*, without proclamations, but containing a clause of warranty: *C.* survives *A.* and *B.*, and dies, leaving issue *D.*:—*Held*, that the right of entry of *D.* was taken away by the effect of the warranty.

EJECTMENT on the demise of *Charles Thomas*.—At the trial, before *Patteson, J.*, at the *Lent Assizes* for the county of *Monmouth*, it appeared, that the land in question had been settled upon *Adam Thomas*, the grandfather of *Charles Thomas*, the lessor of the plaintiff, for life, remainder to *Catherine Thomas*, the grandmother of the lessor of the plaintiff, for life, remainder to the heirs of the body of *Catherine* by *Adam* to be begotten. *Catherine*, the grandmother, died in 1788; *Adam*, the grandfather, in 1802. *John Thomas*, the issue of the marriage of *Adam* and *Catherine*, died in 1822, leaving one son, *Charles*, the lessor of the plaintiff. The defendant put in a conveyance in fee of the land in question, by lease and release, dated *May, 1784*, from *John Thomas*, the father of the lessor of the plaintiff, to *J. Price*, the party under whom the defendant claimed. The release contained a covenant to levy a fine. The defendant also proved a fine *sur consuance &c.*, of *Easter Term, 1785*, levied by *John Thomas* to *J. Price*, but the legal evidence of the proclamations was not given. The fine contained a warranty in the usual form. A verdict having passed for the lessor of the plaintiff, *Maule*, in *Easter Term*, obtained a rule to enter a nonsuit, against which cause was now shewn by—

Russell, Serjt.—The fine in question was levied by *John Thomas* when he was only issue in tail. His mother, *Catherine*, was then seised of the estate tail; *John Thomas* had only a bare possibility. In 1802, he would have become tenant in tail in possession, if he had not disposed of his right. The title of the lessor of the plaintiff arose on the death of *John Thomas* in 1822, and the question is simply this, whether the fine levied in 1785 can bar the son of his right of entry on the death of his father. It is perfectly

clear, that, in 1785, *John Thomas* could not discontinue the estate tail. There are many cases establishing this position, which are cited in *Doe d. Jones v. Jones* (a), where the present Lord Chief Justice of the Court of *King's Bench* mentions it as a general rule, "that none shall make a discontinuance but he who is seised of an estate tail in possession." It may be argued that the fine operated as an estoppel, and that the heir in tail is estopped from saying, that *partes finis nihil habuerunt*. The answer is, that the heir in tail will not be so affected, unless the fine be levied with proclamations.

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[*Bayley, B.*—It is not contended that the fine binds by estoppel, but that it bars the entry.]

If the issue in tail be not barred from using the plea of *partes finis, &c.*, then that plea is clearly made out in the present case. It must therefore be contended on the other side, that he is barred from using that plea. The statutes which take away this plea, are 4 *Hen.* 7, c. 24, and 32 *Hen.* 8, c. 36. Now, these statutes expressly refer only to fines with proclamations. In all the books of authority, fines with proclamations are treated as the only fines which affect the issue in tail (b). The heir in tail is not barred except by force of these statutes. In *Grant's* case, cited by *Warburton, J.*, in *Lampet's* case (c), "it was resolved, that the estate tail was barred, and yet the conusor had but a mere possibility to have an estate tail at the time of the fine levied; and that, by force of the words of the statute 32 *Hen.* 8, c. 36, 'all fines levied with proclamations, of any manors, &c., before the time of the same fine levied, in anywise entailed to the person or persons so levying the same fine, or to any of his or their ancestors,' &c.; and although the said *John Grant* was not seised by force of the tail at the time of the fine levied, yet by reason of these words (before the fine levied in anywise entailed), an estate

(a) 1 B. & C. 241.

(b) *Shep. Touch.* 13, 14.

(c) 10 *Rep.* 50 a.

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tail *in futuro* is comprehended, and *all that by force of the statutes.*" There, the issue in tail might have said, *partes finis nihil habuerunt*; but they were estopped by the statutes. So it is laid down in *Sheppard's Touchstone* (a)—"If lands be given to *A.* and the heirs male of his body, the remainder to *B.* and the heirs male of his body, the remainder to the right heirs of *A.*, and *A.* doth bargain and sell this land by deed indented and enrolled to *T. S.* and his heirs, and after levy a fine upon it, *sur conusance de droit come ceo* &c., to him and his heirs, by this the remainder to *B.* is not discontinued, but it is a bar to the estate tail by the statutes, and causeth the estate of the bargainee to last so long as the tenant in tail hath issue of his body; but, if the fine had been before the bargain and sale, it had been a discontinuance of the remainder, but, in neither case, a bar to him in remainder."

Again, in the same book, the issue in tail are stated to be barred, provided the fine be with proclamations; and it is said that the issue in tail are barred by reason of the proclamations (b).

There could be no discontinuance; for, *John Thomas* had nothing to discontinue at the time the fine was levied by him, and he did no act which could work a discontinuance after the death of his mother and father.

But some use was attempted to be made of the warranty in the fine levied by *John Thomas*; and *Coke Littleton*, s. 601, was cited for that purpose:—"But it is said, that, if the tenant in tail in this case release to his disseisor, and bind him and his heirs to warranty, and dieth, this is a discontinuance by reason of the warranty." The commentary upon this section shortly gives the reason why the addition of the warranty maketh the discontinuance, *viz.* "If the issue in tail should enter, the warrantie, which is so much favoured in law, would be destroyed; and therefore, to

(a) Pages 27, 28. (b) Shep. Touch. 36, 7th edit. in the brackets.

the end that, if assets in fee-simple do descend, he to whom the release is made may plead the same, and bar the demandant."

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In the present case, there is no pretence for saying that any assets descended. *Litt. s. 618* shews, that, of things which lie in grant and not in livery, no discontinuance can be worked, though they be granted by fine in the King's Court. The reason given in the commentary to the above passage is, "for that of such things the grant of tenant in tail worketh no wrong," for nothing passes but what is lawful, "and every discontinuance worketh a wrong." *John Thomas*, at the time of the fine levied, had no estate in any thing lying in livery within the meaning of this doctrine. *Doe d. Christmas v. Oliver (a)*, and *Weal v. Lower (b)* were cases of contingent remainder-men *in fee*, and the present question is not affected by those decisions.

Maule and Busby in support of the rule.—By the marriage settlement, the mother had a vested remainder in tail, and her son had a mere possibility, like the son of tenant in fee. The cognisor, therefore, of the fine, when it was levied, was a stranger, having nothing in the land. At the death of the tenant in tail, the issue would have had the estate tail by inheritance, if it had not been for the title conveyed by the fine to those under whom the defendant claims. On the subsequent death of the cognisor, the title of the lessor of the plaintiff is supposed to have accrued. The question therefore will be, what is the effect of a fine without proclamations, levied by a person having such a bare possibility of an estate tail, as in the present case, when the estate subsequently comes to the cognisor of the fine.

The fine operated as an estoppel against the cognisor and those who claim under him, and the estoppel would be

(a) 19 B. & C. 181.

(b) Poll. 54.

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fed by the interest which subsequently descended upon the cognisor. It is said, however, that the doctrine of estoppel does not apply to issue in tail; and that the plea *quod partes finis nihil habuerunt* is only taken from the issue in tail by force of the statutes 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, which refer only to fines with proclamations. In fact, however, that plea was taken away by the statute *de finibus levatis*, 27 Edw. 1, c. 1, as it was distinctly resolved in the case of *finis* (a). The effect of fines without proclamations depends upon statutes anterior to 4 Hen. 7, c. 24. At common law, a fine barred not only parties and privies, but all other persons being *compotes*, &c. who did not claim within a year and a day (b); but assuming, that, by the statute *de modo levandi fines*, 18 Edw. 1, such a fine is limited in its operation, and binds only the cognisor and those claiming under him, the question will be, what further limitations are introduced by other statutes. The earlier statute *de donis* (c), was passed to prevent tenants in tail, having conditional fees, from alienating after condition performed, so as to bar their issue or the donor; and the form of the writ prescribed by that statute shews that there was no remedy by entry. A tenant in tail is considered, in the eye of the law, as seised of an estate of inheritance; and if, before this statute, lands had been given to a man and the heirs of his body issuing, and before issue he had made a feoffment in fee, the donor could not enter for the forfeiture, and the feoffment would have barred the issue had afterwards (d). This statute, however, does not make void the fine, but *ipso jure sit nullus*, that is, it doth not bind the right, yet it shall make a discontinuance (e). The statute 27 Edw. 1, c. 1, *de finibus levatis* (f), was

(a) 3 Co. 89. a.

(b) 18 Ed. 1, *modus levandi fines*.

(c) 13 Ed. 1, Westm. 2, c. 1;
2 Inst. 331.

(d) 3 Inst. 333; Co. Lit. 326. b.,
and note 281 by H. & B.

(e) 2 Inst. 336.

(f) 2 Inst. 521.

passed to increase the effect of fines—not the common law effect, because, at common law, they bound parties and privies, but the effect which had been left by the statute *de donis*. The statute *de finibus levatis* recites the abuse which had crept in, in allowing averments by parties and privies, that, before and at the time of levying the fine, and afterwards, the demandants and their ancestors were always seised of the lands, or of some parcel thereof, which, in fact, amounted to an averment that the parties to the fine were not seised. In effect, this statute took away the plea *quod partes finis nihil habuerunt*; “and albeit this statute extendeth to averments taken by parties and privies, and extendeth not to averments made by strangers that are no parties nor privies to the fine, yet, by the common law, the hauteesse and puissant force and nature of fines was such, that a mere stranger could not have a general averment against a fine” (a). In *Zouch v. Bampffield* (b), it was considered by *Anderson, Periam, Windham, and Rhodes*, whether, before the statutes 4 Hen. 7, and 32 Hen. 8, the heir in tail could aver against the fine of his ancestor, *partes finis nihil habuerunt*; and Lord *Coke* says, that “it seems to be the better opinion of the books, that, before the statutes of 4 Hen. 7, and 32 Hen. 8, the issue in tail was not admitted to such averments against a fine levied by his ancestor.” That statute does not, however, take away the right of the issue in tail to avoid an alienation contrary to the statute *de donis*, because, the issue in tail would not, in that case, plead *quod partes finis nihil habuerunt*; but, that the cognisor had something in the land, and could not alienate. In *Doe d. Christmas v. Oliver* (c), a fine levied by a person who had only a contingent remainder, was held to operate by estoppel until the contingency happened, and afterwards to operate upon

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(a) 2 Inst. 522.

(b) Cited 3 Co. 88; 1 Leon. 75, 83.

(c) 10 B. & C. 181.

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the estate. It is true, that that was a fine with proclamation; but the case did not proceed upon that ground. In *Weale v. Lower* (a), it was agreed that the contingent remainder descended to the cognisor's heir; and though the fine operated at first by conclusion, and passed no interest, yet the estoppel bound the heir; and that, upon the contingency, the estate by estoppel became an estate in interest of the same effect as if the contingency had happened before the fine was levied (b). And in *Zouch's* case, though the fine was with proclamations, the Court felt no difficulty in entertaining the position, that a tenant in tail, out of possession, might well levy a fine.

But the warranty in the fine clearly discontinued the estate tail, at least as against the issue of the cognisor. It cannot be argued that it is necessary there should be an estate in the cognisor, in order that the warranty may operate. Collateral warranty was taken away by the statute 4 & 5 Ann. c. 16, s. 21:—this is a lineal warranty. Lord *Coke* (c) says, a warranty lineal is a covenant real, annexed to the land by him who either was owner or *might* have inherited the land, and from whom his heir lineal or collateral might by possibility have claimed the land as heir from him who made the warranty. And *Littleton* (d), has this passage,—“And note that every case where a man demandeth lands in fee tail, by writ of *formedon*, if any of the issue in tail that hath possession, or that *hath not possession*, make a warranty, &c., if he which sueth the writ of *formedon* might by any possibility, by matter which might be *en fait*, convey to him, by him that made the warranty, *per formam doni*, this is a lineal warranty, and not collateral.” *Littleton* therefore assumes that the issue in tail, out of possession, may make a warranty. Here the cognisor might have inherited the land. The estate tail

(a) Roll. 54.

(b) *Fearne*, c. 6, s. 5.

(c) Co. Lit. 370. a.

(d) Sec. 75.

afterwards came to the cognisor, and then, at all events, the warranty became annexed to the land.

The effect, then, of the fine in this case would be, that it would operate by estoppel, which would be fed by the interest subsequently descending in the cognisor, or work a discontinuance of the estate, or toll the entry of the issue in tail.

Cur. adv. vult.

The judgment of the Court was now delivered by Lord LYNDHURST, C. B.

This cause was tried at the last Assizes for the county of *Monmouth*, and a motion was made on the part of the defendant to set aside the verdict which was found for the plaintiff, and to enter a nonsuit. The estate had been settled upon the grandfather of the lessor of the plaintiff for life, remainder to the grandmother in tail; afterwards, in the lifetime of the grandfather, and during his seisin, the father levied a fine *come ceo*, with warranty, but (as we must take it upon the evidence in this case) without proclamations; and the question is, whether this fine with the warranty has taken away the right of entry of the son; and we are of opinion that it has. We cautiously abstain from saying that it worked a discontinuance, because, though the entry is taken away as to the issue in tail as effectually as by a discontinuance, it is not taken away as to a remainder-man or a reversioner (*a*), which would be the case upon what is properly a discontinuance. *Littleton*, in s. 637, states, in the form of a note, that an estate tail cannot be discontinued but where he that makes the discontinuance was once seised by force of the entail, unless it is by reason of a warranty; and he puts this case as an instance. If there be grandfather, tenant in tail, father, and son, and the grandfather is disseised by the father, and the father make a feoffment without warranty, and die, and

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(*a*) 1 Leonard, 83.

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then the grandfather die, the son may well enter, because this was no discontinuance, inasmuch as the father was not seised by force of the entail, at the time of the feoffment: and upon the words "unless it be by reason of a warranty," Lord *Coke* has this comment—"For, in many cases, a warranty added to a conveyance is said to make a discontinuance *ab effectu*, although he that made the conveyance was never seised by force of the estate tail, because, it doth take away the entry of him that right hath, as a discontinuance doth." And after noticing, that, had the father survived the grandfather, the son might, nevertheless, have entered, upon the father's death, he adds, "but, if the feoffment had been with warranty, then it had wrought the effect of a discontinuance."

In *Littleton*, ss. 598, 601, another instance is put of the difference which a warranty occasions by taking away the entry of the issue in tail. If tenant in tail be disseised, and release to the disseisor (without warranty), this is no discontinuance; but, if he release to the disseisor, and bind himself and his heirs to warranty, and this warranty descends upon his issue, this is a discontinuance by reason of the warranty. Lord *Coke* gives the reason of this:—"If the issue in tail" he says, "should enter, the warranty, which is so much favoured in law, should be destroyed; and therefore, it makes a discontinuance, to the end that, if assets in fee-simple do descend, he to whom the release is made may plead the same, and bar the demandant; by which means all rights and advantages are saved." The reason why the warranty in such case would be destroyed, may be elicited from *Seymour's* case (a), for that case establishes this position, that to make a warranty contribute to work the effect of a discontinuance, it must be annexed to some estate, and must continue so annexed; for, the instant that estate is determined, the power of enforcing the

(a) 10 Co. 96. a.

warranty ceases. To what estate, then, is the warranty in this case annexed? *John*, the cognisor, had no estate when he levied the fine; the fine operated in its creation by estoppel only, and though, upon *Adam's* death, the estate which *John*, the cognisor, took, would feed the estoppel, it would, we think, feed it only so long as it rightfully might—that is, during *John's*, the cognisor's life, and no longer. And though, if the lessor of the plaintiff were at liberty to insist upon this point, it might not admit of an answer; yet, if he be by law precluded from so doing, and if, from being privy to *John*, the cognisor, as heir in tail, through him he is prevented from saying that the parties to the fine had nothing in the land at the time the fine was levied, the fine will have the same effect, as against him, as if the parties to the fine had been seised at the time the fine was levied; and we are of opinion, that, by law, he is so precluded. By 27 *Edw. 1*, c. 1, the parties to a fine and their heirs were prohibited from avoiding a fine by pleading, that, before and at the time of the fine, and afterwards, the defendants or their ancestors were always seised; and in the case of fines (a), the effect of this provision is stated distinctly to have been, to take away from the issue in tail the power of averring *quod partes finis nihil habuerunt*. Exception had been taken, that 27 *Edw. 1*, did not extend to heirs in tail, but only to heirs in fee-simple; to which it was answered, that, although the issue in tail was not barred by any fine by his ancestor before 4 *Hen. 7*, yet he was ousted to aver in such case *quod partes finis nihil habuerunt*, and, being privy and heir to him who levied the fine, was, by the statute 27 *Edw. 1*, estopped and concluded to annihilate the fine of his ancestor by such plea. And although it is provided by the statute *de donis*, *quod finis ipso jure sit nullus*, that is to say, to bar the right of the issue in tail, yet it is an estoppel to him to say *quod partes finis nihil habuerunt*;

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and he refers to 22 *Edw. 3*, c. 17, and *Fitzherbert, Estoppel*, pl. 280, 33 *Edw. 3*, where instances of such estoppels occur. In *Zouch and Bampfild's case* (a), it was said by the Justices, that, though the statute *de donis* doth avoid the fine as to the foreclosing of the issue and tail of his *formedon*, yet it remaineth in force to restrain the heir in tail from averring a thing against the fine, as well as the heir in fee-simple; and in all cases where he against whom a fine is pleaded claims by him who levied the fine, he shall not have the same averment. If my father, tenant in tail, or tenant in fee, grant the land by fine, and afterwards I make title to the same land by the same ancestor, I shall not be received to say, that they who were parties to the fine had not any thing at the time of the fine levied. Upon these authorities, we are of opinion, that the lessor of the plaintiff, who is clearly privy to *John*, the cognisor, and claims as heir in tail by him, is estopped from saying, that there was not a proper seisin at the time this fine was levied; that it must therefore be taken, as against him, that the fine created an estate to which the warranty was annexed, and that, to protect such warranty, and prevent the lessor of the plaintiff from destroying such estate, and thereby screening any assets he may have by descent from claim under such warranty, the fine in this case had, by reason of the warranty, the effect of a discontinuance; that the entry of the lessor of the plaintiff is consequently taken away; and that the rule for a nonsuit ought to be absolute.

Rule absolute.

(a) 1 Leon. 83.

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HALL v. GUMPLE and Another.

THE defendants in this case had a warehouse at *Manchester*, where their business was conducted by a manager, but they resided at *Hamburgh*, and had no dwelling-house in this country. On the 31st *January*, a *venire* against the defendants was left with their manager, at their warehouse, and, no appearance having been entered, on the 23rd *February* a *distringas* issued, according to the old practice of the Court, indorsed to levy 40*s*. It did not appear from the affidavits, that the Sheriff had made the usual return of *summoneri feci* before the *distringas* issued. A rule *nisi* having been obtained, to set aside the *distringas* for irregularity, with costs, and for a return of the issues levied—

The service of a *venire* at the counting-house of defendants, who have no residence in this country, is not a sufficient service to warrant the issuing of a *distringas* according to the old course of the Court.

Semble, That the old mode of proceeding by *venire* and *distringas* is taken away by the stat. 7 & 8 *Geo.* 4, c. 71, s. 5.

Clarke shewed cause.—He contended, *first*, that the statute 7 & 8 *Geo.* 4, c. 71, s. 5, did not affect the common law mode of proceeding by *venire* and *distringas*; *Nicholson v. Bownas* (a), *Petty v. Smith* (b), *Kemp v. Sumner* (c)—and, *secondly*, that as it was not the object of this proceeding to enter an appearance for the defendants, it was sufficient to leave the process at their counting-house with their accredited agent; *Mensies v. Rodrigues* (d), *Petty v. Smith*; more particularly as foreigners might, like the defendants, obtain credit in this country, and, by residing abroad, avoid the process of this Court, which had no other means of compelling an appearance.

Richards, contra.—It is true, that there are several cases in which it has been holden that the old course of proceeding by *venire* and *distringas* remains, notwithstanding

(a) 3 Price, 266.

(b) 2 Y. & J. 111.

(c) Id. 405.

(d) 1 Price, 92.

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the positive enactment to the contrary. But this Court has latterly inclined to a different opinion; and it would seem, from the case of *Pitt v. Eldred* (a), and the cases which have followed that decision, that the plaintiff can now only have a *distringas* by complying with the provisions of the statute. But, without adverting to that point, this service is insufficient, even according to the old practice. Personal service was not required (b), but it was necessary that the defendant should have actual notice, or that the process should be so served, as to afford him the means of knowledge. Thus, in *Petty v. Smith*, the service was at the counting-house of the parties, who were all personally served but one, who was abroad, and the *distringas* issued against the partnership goods. The partners served were conusant of the claim. So, service at the *residence* of a single defendant, who was abroad at the time, has been holden sufficient; *Brier v. Lansdown* (c), *West v. Dalton* (d); but in *M'Nab v. Ingham* (e), a service at the counting-house of the defendants, by leaving the *venire* with their clerk, was holden to be insufficient, because the defendants were from home at the time, though they were in *England*. Indeed, it is contrary to principle, that the goods of a defendant should be taken for disobedience to a process of which he can have no notice.

Lord LYNTHURST, C. B.—It is contrary to principle that a *distringas* should issue, to take the goods of a defendant, without any notice that a process has issued against him. Such is the effect of the practice contended for. But, as it does not appear whether the summons has been returned by the Sheriff, we will delay our judgment, in order that that fact may be supplied.

(a) *Ante*, p. 147.

(c) Bunb. 67.

(b) Tidd, 155; Man. Pract. 18,
19, 23.

(d) Forrest, 29.

(e) 2 Price, 76.

BAYLEY, B.—It has been decided, that the statute 51 Geo. 3, c. 124, does apply to this Court; *Moore v. Taylor*(a); and the stat. 7 & 8 Geo. 4, c. 71, s. 5, is similar in its enactment. At all events, it is, even according to the old practice, discretionary with the Court to grant or refuse a *distringas*; *M^cNab v. Ingham*; and, if the latter statute did not take away the ancient mode of proceeding, the Court may regulate its practice by analogy to the provisions of the act of Parliament. If the statute does not apply, the numerous applications for writs of *distringas* have been unnecessary, and the case of *Pitt v. Eldred*, and the subsequent cases, have been improperly decided.

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VAUGHAN, B.—It is a contempt of the Court not to appear in obedience to process, and upon this ground the *distringas* issues. To found this proceeding, the *venire* should be personally served, or it should be shewn to the Court, that the defendant kept out of the way to avoid the service.

Cur. adv. vult.

The return of *summoneri feci* was subsequently produced, when—

BAYLEY, B., delivered the judgment of the Court.—We have considered this case, and are of opinion that the *venire* was not properly served, the defendants having no residence in this country. The rule must be made absolute, with costs, the defendants undertaking to bring no action.

Rule absolute.

(a) 5 Taunt. 71, n.

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SMITH and JAGO v. BROWN. .

A bill for business by two attorneys in partnership, signed by one in the name of the firm, is a sufficient subscription within the statutes 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, although the signature do not contain the Christian names of the partners.

ASSUMPSIT on an attorney's bill for obtaining a bankrupt's certificate.

At the trial, before *Vaughan, B.*; at the *Westminster* Sittings in this term, the bill, proved to have been delivered, appeared to have been signed by *Smith* for himself and *Jago*, who had been his partner at the time of the business done. After setting out the items, the bill concluded thus:—

“This and the foregoing two pages contain our bill against you.

Smith & Jago.”

A verdict having passed for the plaintiffs—

John Williams obtained a rule to enter a nonsuit, on the ground that the bill delivered had not been properly signed within the provisions of the statutes 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, s. 23, he referred to *Collins v. Treweek* (a), *Hill v. Humphries* (b), *Sinclair v. Curry* (c), and *Taylor v. Fenwick* (d), and urged, that the Christian names, as well as the surnames of each of the partners, ought to have appeared in the signature.

Talfourd shewed cause.—The first ground on which this rule was obtained, was, that the provisions of the statute 3 Jac. 1, were not complied with. That objection, however, is clearly disposed of. The language of the statute is, that “all attorneys and solicitors shall give a true bill, &c. of all charges concerning the suits which they have for them, subscribed with his own hand and name.” This provision

(a) 6 B. & C. 394; 9 D. & R. 456.

(b) 2 B. & P. 343.

(c) 7 T. R. 631.

(d) 3 B. & P. 553, note, and 7 T. R. cited 633.

only applies, therefore, to proceedings in suits. The present bill is for business done in proceedings in bankruptcy; and, if there were no other statute, it is quite clear that no bill need have been delivered, though this bill might perhaps have been taxable under the statute 2 *Geo. 2*, c. 23, s. 23, as containing the items for the Chancellor's allowance. The provisions of the statutes, however, were sufficiently complied with by delivering a bill in the name of the firm. It is quite clear that each of the partners had authority to sign for both, and it is not pretended to be an objection that each partner did not himself subscribe; but it is said that the Christian names of the parties ought to have been stated in the signature. The name of the firm is, however, much better for all purposes of information. Section 22 of the same act (*a*), requires that the *name* of the attorney suing out a writ shall be indorsed thereon. Hundreds of writs are sued out by attorneys in partnership, and they are always indorsed in the name of the firm, but no motion has ever been made to set aside such writs for irregularity. Several cases were cited in moving for the rule *nisi*, as to notices to be given to magistrates under 24 *Geo. 2*, c. 44; but the case of *Mayhew v. Locke* (*b*) is much more applicable to the present question. In that case the attorney's name was held to be sufficiently indorsed by putting the initial only of the Christian name before the surname.

[*Bayley, B.*—There is one case where one of the initials of an attorney who had two Christian names, was omitted].

[*Vaughan, B.*—That was the case of *James v. Swift* (*c*). In that case, Mr. Justice *Holroyd* observed, that the 24 *Geo. 2*, c. 44, required the *name*, not the *names*, of the attorney to be indorsed, and “there it would seem that the

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(*a*) 2 *Geo. 2*, c. 23.

(*b*) 2 *Marshall*, 377; 7 *Taunt.* 63.

(*c*) 4 *B. & C.* 681; 6 *D. & R.* 625.

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statute did not require the Christian name of the attorney to be indorsed on the notice"].

The statute 3 *Jac.* 1 also uses the word *name* in the singular, and the case of *James v. Swift* is strongly in point. The statute 2 *Geo.* 2, c. 23, omits the name and requires the hand, &c. If one partner has a right to sign for the other, the present signature is clearly sufficient within the latter statute. If it were at all necessary, this might be contended to be a convenient, usual, and intelligible (a) abbreviation within the provisions of the 12 *Geo.* 2, c. 13, s. 5.

John Williams, in support of the rule.—The statute of *James* is not confined to suits. Taking the recital and enacting parts together, it would clearly include charges, cases, and opinions laid before Serjeants and counsel, &c. Such fees and charges are not of necessity confined to what occur in the progress of a suit. *Mayhew v. Locke* is an authority in the defendant's favour. There, the indorsement of *D. Shuter* was rendered intelligible by the signature of *David Shuter* on the face of the notice, and yet it was with considerable difficulty and after much discussion that the Court held the notice sufficient.

It was not contended, and there is no ground for contending, that the statute of *James* has been repealed by the latter statute. That point was recently decided in *Heming v. Wilton* (b).

[*Bayley, B.*—The statute of *James* has been held to apply only to the superior Courts, and not to extend to business done in the inferior Courts (c). Can it apply to business done in bankruptcy?]

The two acts are to be construed as *in pari materiâ*;

(a) *Reynolds v. Caswell*, 4 Taunt. 193.

(b) 1 M. & M. 529.

(c) Carth. 147; 1 Show. 96; 1 Salk. 86.

and when the act of 2 *Geo. 2* mentions the word subscribed, it must be intended as meaning subscribed with a name, as in the former statute, and not with a dash. If the statute requires the name to be subscribed, it cannot be satisfied without the Christian name, which is an essential part of every man's name in *England*. Statutes of this nature are to be construed strictly, as in *Taylor v. Fewwick (a)*, "this notice given under my hand at *Durham*," was held not sufficiently to state that *Durham* was the place of the attorney's abode. In the present case, *Jago*, one of the attorneys suing, has not signed any bill at all.

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BAYLEY, B.—I will take it for granted, for the purposes of this question, that both the 3 *Jac. 1*, c. 7, and the 2 *Geo. 2*, c. 23, are in full force, and must be taken to regulate this case. The first of those statutes enacts, that "all attorneys and solicitors shall give a true bill unto their masters or clients, or their assigns, of all charges, &c., concerning the suits, &c., subscribed with his own hand and name;" and the second enacts, that the "bill shall be subscribed with the proper hand of such attorney or solicitor." Now, the question in the present case is, what is the name, with reference to these acts, of the parties who are the plaintiffs in this action. A man may have a Christian name, and commonly use it, and that in one respect is part of his name; but he may also have a partnership name, as it constantly happens in bills of exchange accepted by one of a partnership for the firm, where the name of the style or firm is used to bind the whole; and in pleading it has been usual to state that their hands are subscribed. In all these cases the word *name* may be predicated of what is written or subscribed without the Christian names of the partners being used. Now, in the present case, it seems to me that the proper business name of the firm has been used, with-

(a) 7 T. R. 635.

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in the meaning of the statutes in question. The 22nd section of the statute 2 *Geo. 2*, c. 23, is quite as distinct in requiring the name of the attorney to be indorsed on the process, and yet in practice it is always found, that, when process is issued by attornies acting in partnership, it is indorsed with the name of the firm, and that is considered as an indorsement of the name within the meaning of that section of the act of Parliament. Therefore, as it seems to me, *Smith & Jago* was the proper name with which these plaintiffs ought to have signed the bill, and each partner having a right to subscribe the name of the partnership firm for partnership purposes, the signature of the firm of *Smith & Jago* is a signature of the proper name, within the meaning of the statute; and I am of opinion that the objection taken in this case was not valid, and consequently that this rule must be discharged.

VAUGHAN, B.—I am of the same opinion. It may be conceded, as to this question, that the statute of *James* is not repealed. The mode adopted in this case is not calculated to mislead; it is the usual mode, and it gives the most information. In *James v. Swift*, Mr. Justice *Holroyd* thought the statute in question in that case, requiring the *name* and not the *names*, did not require the Christian name. That is a strong authority against the objection in this case.

BOLLAND, B.—I think the description in this case quite sufficient. There is a manifest distinction between the cases on attornies' bill and those which have been referred to on notices to magistrates. In *Collins v. Trewick* (a) the Court of *King's Bench* held, that the attorney's bill was in the nature of a notice. Now, a notice to a magistrate should

(a) 6 B. & C. 394; 9 D. & R. 456.

enable him to know where to go to tender amends; but, even in the class of cases on these notices, the Courts, though they required the residence to be very particularly stated, have not been so strict as to the name. But, in the case of an attorney's bill, the delivery of the bill is only a notice that the client may have a month to ascertain whether he has been properly charged. Now, he must know his attorneys, and he may go at once to the Master to get the bill taxed. I therefore think that this signature was quite sufficient within the acts of Parliament, and, consequently, that this rule must be discharged (a).

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Rule discharged.

(a) Lord *Lyndhurst*, C. B., was sitting in Equity.

ROBERTS v. WRIGHT.

HENDERSON had obtained a rule *nisi* in this case, to change the *venue* from *Carnarvonshire* to *Denbighshire*, upon the usual affidavit.

The *venue* in an action upon an I. O. U. may be changed, upon the usual affidavit.

John Jervis shewed cause, upon affidavit, which stated that the action was brought upon an I. O. U. He contended that this instrument was like a promissory note, in an action upon which the *venue* could not be changed.

Henderson.—As a general rule, the defendant may change the *venue* in all transitory actions, and the cases put by *Tidd*(a) are exceptions to that general rule. An I. O. U. is not like a promissory note; it requires no stamp,

(a) *Tidd*, 603, 604.

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and which for this purpose is a material distinction, it does not pass by delivery. The rule does not apply to writings generally.

Per curiam.

Rule absolute.

PENNELL v. KINGSTON.

The Court will not increase issues upon a *distringas* issued upon the Sheriff's return of *summoneri feci* to the *venire*, according to the old course of the Court.—*Semble.*

A *VENIRE* having been served in this case, according to the old course of the Court, a *distringas* issued, upon the Sheriff's return, to levy 40s., and *Meeson* now moved, upon an affidavit of debt, to increase the issues.

[*Bayley, B.*—Have you considered the effect of the stat. 7 & 8 *Geo.* 4, c. 71, s. 5, upon the ancient mode of proceeding by *venire* and *distringas*?]

Meeson then insisted that the statute had not abrogated the common law mode of proceeding, but was merely cumulative, and permitted a plaintiff who followed its provisions to enter an appearance for the defendant. *Nicholson v. Bownus* (a), *Dwerryhouse v. Graham* (b), *Petty v. Smith* (c), and *Kemp v. Sumner* (d).

BAYLEY, B.—I have considered those cases, and, notwithstanding those decisions, entertain a doubt whether the ancient mode of proceeding has not been taken away by stat. 51 *Geo.* 3, c. 124, and 7 & 8 *Geo.* 4, c. 71. I can make no order; but you may mention it to the Court.

It was subsequently mentioned in full Court, and the Barons were of opinion that the cases cited did not dis-

(a) 3 Price, 268.

(b) *Ib.* n.

(c) 2 Y. & J. 111.

(d) *Id.* 406.

pose of the difficulty arising upon the statute. They gave no express opinion upon the point, but refused to order the issues to be increased, because they might be called upon to supersede the *distringas* in pursuance of an express enactment upon the subject. They said, that a plaintiff might obtain a *distringas* by complying with the act; but that, if he proceeded at common law, he must do so of his own authority, and the Court would not assist him.

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KINGSTON.

Rule refused (a).

(a) In *Michaelmas Term*, Price made a similar application, as a motion of course, which was granted; but the Court having subsequently ascertained the nature of

the motion, stayed the rule, and directed the application to be renewed at the sittings after the term.

FAREBROTHER and Another v. WORSLEY and Others,
Executors of HIRST, deceased.

COVENANT by the Sheriff of *Middlesex*, against the executors of a deceased surety of a bailiff. The declaration set out an indenture, dated the 28th *September*, 1826, between the plaintiffs, as Sheriff of *Middlesex*, of the one part; and *Joshua Hirst*, the younger, *Worsley* the defendant, *J. N.*, *D. R.*, *R. T.*, *W. C.*, and *J. Hirst*, the elder, since deceased, of the other part; by which the

Where a Sheriff's bailiff, in the deed appointing him bailiff, covenanted (*inter alia*) to pay the Sheriff the costs and charges of defending any action, or of prosecuting or opposing any motion, &c., touch-

ing or concerning any matter wherein the bailiff should act, or assume to act as bailiff, to the said Sheriff; and afterwards, in the same deed, covenanted to indemnify, &c., the Sheriff, against all actions, costs, &c., &c., which might be commenced, &c., or which he might suffer, pay, or be liable to, for or by reason of the executing, not executing, returning, or not returning, or mis-return of any writ, process, mandate, precept, or warrant, occasioned by the act or default of the said bailiff:—*Held*, that the covenant was not confined to the wrongful act of the bailiff, but, that it extended to protect the Sheriff from the costs, &c., which he had incurred, from an action, &c., having been prosecuted against him, in consequence of a return made by him to a writ, on instructions for the return given by the bailiff, though those instructions were correct and proper.

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plaintiffs, at the instance and request of the said *J. H.* the younger, and in consideration of the covenant and agreement thereafter entered into, &c., did nominate and appoint the said *J. H.* the younger, to be one of the bailiffs of the said Sheriff (during the pleasure of the said Sheriff), permitting him to receive to his own use all lawful fees usually received by Sheriff's bailiffs in the said county of *Middlesex*, but reserving to the said Sheriff the poundage and such other fees and profits on writs of execution and extent as had been usually received by the Sheriff of the said county of *Middlesex*, and all such other fees and emoluments to the said Sheriff belonging; and, in consideration of the premises, the said *J. H.* the younger, &c., &c., (the said parties of the second part), for themselves jointly and severally, and for their several and respective heirs, executors, &c., did, and each of them did covenant, &c., to and with the said plaintiffs and each of them;—

That the said bailiff should duly execute all warrants or mandates to him directed by the said Sheriff, his under-sheriff or deputies, or any of them, in the name of the said Sheriff;

That the said bailiff should give regular instructions in writing, for the return of all writs or process, in all cases in which warrants should have been executed by or directed to the said bailiff;

That the said bailiff should and would forthwith pay to the said Sheriff, under-sheriff, or deputies, all monies received by the said bailiff on any arrest or levy by him made, or with which he should be entrusted for the said Sheriff, without deduction;

That the said bailiff should, in all things, truly, lawfully, and honestly demean and behave himself, as bailiff as aforesaid, and in due and lawful manner all and every the lawful commands or directions of the said Sheriff, his under-sheriff, and their deputies, touching any manner of service

incident or belonging to the said office of Sheriff, should and would execute and perform ;

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That the said bailiff should and would well and truly pay to the said Sheriff, his under-sheriff, or deputies, or one of them, the *costs and charges of defending any action*, and of prosecuting or opposing any motion in or application to the Court, touching or concerning any matter wherein the said bailiff *should act, or assume to act, as bailiff to the said Sheriff*;

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That the said bailiff and his sureties, some or one of them, should indemnify the said Sheriff and his under-sheriff, or deputies, from all damages, loss, costs, and charges, which they, or either of them, should or might suffer, sustain, or be put unto, or be liable to suffer, sustain, or be put unto, for or by reason of the payment of any money by the said Sheriff, under-sheriff, or deputies, to any person or persons; or by reason of any return to any writ or process made by the said Sheriff, under-sheriff, or deputies, at the request of the said bailiff;

And that the said bailiff and his said sureties, some or one of them, their, or some or one of their heirs, executors, or administrators, should and would save harmless and indemnify the said Sheriff and under-sheriff from and against all actions, suits, fines, amerciaments, penalties, contempts, forfeitures, loss, costs, charges, and expenses, which might be commenced, prosecuted, imposed, or set upon them, or either of them, or which they, or any or either of them might suffer, pay, or be liable unto, for or by reason of the executing, not executing, *returning, or not returning, or mis-return* of any writ, process, mandate, precept, or warrant, *occasioned by the act or default of the said bailiff*; or by reason of execution, escape, or any other cause whatsoever happening by the act or default of the said bailiff.

The declaration then stated, that, by virtue of the said indenture, the said *J. H.* the younger, afterwards, to wit, n &c., at &c., became and was one of the bailiffs of the

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said plaintiffs then and there being Sheriff of the said county of *Middlesex*; and that after the making of the said indenture, and whilst the said plaintiffs were Sheriff of the said county, and whilst *J. H.* the younger was one of the bailiffs of the said plaintiffs as such Sheriff, to wit, on the 2nd *May*, 1827, a *fieri facias* was issued out of the *King's Bench*, commanding the said Sheriff to cause to be levied of the goods and chattels, in his bailiwick, of *A. H. Chambers*, a debt of 16,000*l.* and 7*l.* damages, recovered by *H. Wilton* against him; that the writ was duly indorsed to levy 1825*l.* 10*s.* 5*d.*, and on 21st *May*, 1827, at &c. was delivered to the plaintiffs, as such Sheriff, to be duly executed; and that by virtue thereof they issued their warrant to said *J. H.* the younger, then being one of the said bailiffs of the said Sheriff, thereby commanding him to levy the said debt and damages, so that the said Sheriff might have the money at the return, to render to *Wilton*; that the warrant was delivered to *J. H.* the younger, to be executed, and that the said *J. H.* the younger, acting and assuming to act as bailiff of the said plaintiffs so being Sheriff as aforesaid, and for the purpose of executing such warrant, afterwards, to wit, on &c., at &c., before the return of the said writ, and within the bailiwick of the said Sheriff, did seize and take divers goods and chattels, then in the possession of *F. Bernasconi*, &c., of the value of 20,000*l.*, but did not levy thereout the sum indorsed on the said writ, or any part thereof; and that before the time of the said seizure last mentioned, to wit, on the 19th *November*, 1825, at &c., a certain commission of bankrupt had been awarded and issued against the said *A. H. Chambers*; and the said *F. Bernasconi*, &c., at the time of the said seizure, held and claimed possession of the said goods and chattels so seized, as assignees of the estate and effects of the said *A. H. Chambers* in the said writ named, under the said commission, to wit, at &c.; and the said plaintiffs say, that afterwards, to wit,

on the 23rd May, 1827, at &c., a certain rule was made by the said Court of *King's Bench*, whereby the said plaintiffs, Sheriff as aforesaid, were ordered by the said Court to return the said writ; and thereupon, afterwards, in *Easter Term*, in the year last aforesaid, at &c., the said plaintiffs, Sheriff as aforesaid, did move the Court, that the said rule to return the said writ might be enlarged until the said Sheriff should be indemnified to the satisfaction of the Master; and such proceedings were thereupon had in the same Court, in respect of the said motion touching the said writ and the return thereof, that the said plaintiffs were thereby then put unto divers large costs and charges about the same motion, to the amount of a certain large sum of money, to wit, the sum &c. Averment of notice to *J. H.* the younger, and request to him by the plaintiffs to pay them the said costs and charges to which they had been so put as aforesaid. The declaration then stated, that, by reason of the said seizure, and of the acts of the said *J. H.* the younger done in and about the executing of the said warrant, the said *F. Bernasconi*, &c., afterwards, to wit, &c., commenced and prosecuted in the said Court of *King's Bench* a certain action of trespass against the said now plaintiffs and the said *H. Wilton*, in consequence whereof the said plaintiffs did afterwards, to wit, &c., make an application in and to the said Court, to stay the proceedings in the said action of trespass, until they the said Sheriff should be indemnified; and such proceedings were thereupon had in the same Court touching the said application, that the said plaintiffs were thereby there put to divers other large costs and charges about the same application, to the amount, &c. Averments of notice and request as before.

The declaration (a), then averred, that the said *J. H.* the

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(a) There were six other breaches, as to which no question arose on the present occasion.

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younger, as such bailiff as aforesaid, after the making the said seizure, and before the return of the said writ, to wit, &c., instructed the said plaintiffs as such Sheriff, and requested them to return, and the said plaintiffs, as such Sheriff, did, by his instructions, and at his request, then and there return upon the said writ, that the said *A. H. Chambers*, in the said writ named, had not any goods or chattels in the said Sheriff's bailiwick, whereof the said Sheriff could cause to be levied the debt and damages in that writ mentioned, or any part thereof; by reason whereof the said *H. Wilton* afterwards, to wit, in *Hilary Term*, 1828, commenced and prosecuted, in the Court of *Exchequer*, to wit, &c., a certain action on the case against the said plaintiffs, for the recovery of the damages alleged to have been sustained by the said *H. Wilton* by reason of the said return so made by the said plaintiffs upon the said writ, and of the non-execution thereof; and such proceedings were thereupon had in the said Court of his late Majesty, in the said last-mentioned suit, that the said now plaintiffs, by reason thereof, did suffer, sustain, and were put unto divers other large damages, losses, costs, and charges, to the amount of 500*l.*, in and about defending the said last-mentioned action, and incidental thereto: of all which several premises, the said *J. H.* the younger, afterwards, to wit, on &c., at &c., had notice, and was then and there requested by the said plaintiffs to pay them the damages, losses, costs, and charges which the said plaintiffs had so suffered, sustained, and been put unto, as last aforesaid, and to indemnify them from and against the same, to wit, at &c.

The second (a) plea to the breach in question was, that the said *A. H. Chambers* had not, at any time from the delivery of the said writ of *fiery facias* in that breach men-

(a) The first plea took issue on the fact of the instructions to the Sheriff to return the writ.

tioned, before the said return thereof, any goods or chattels in the bailiwick of the said Sheriff, whereof the said Sheriff could cause to be levied the debt and damages in that writ mentioned, or any part thereof.

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Demurrer and joinder.

Burchell for the plaintiffs.—If this plea were to succeed, it would be impossible for a Sheriff to protect himself; for, the present covenant has been framed expressly for the purpose of protecting the Sheriff from the consequences of all returns and acts of the bailiff by which loss or injury may be sustained by the Sheriff; and it is intentionally not confined to the mis-returns or wrongful acts of the bailiff. The covenant is, that the bailiff, or his sureties, should indemnify, &c., the Sheriff against all actions and loss, &c., which might be commenced, &c., or which he might be put to, &c., or be liable unto, *for or by reason of the executing, not executing, returning, or not returning, or mis-return of any writ, &c., occasioned by the act or default of the said bailiff, or by reason of any execution, escape, or any other cause happening by the act or default of the said bailiff.*

The object of this provision was, to make the bailiff run the risk of all suits which should be brought against the Sheriff for his acts, whether rightful or wrongful. The present was a risk of office brought on the Sheriff by the act of the bailiff, and falls within the meaning of the covenant, which was intended to protect the Sheriff from the consequences of all rightful acts of the bailiff.

This is not like the cases of covenants for title on the sale of a real estate, where the covenant has been held not to extend to guard the estate from wrongful acts; here there is a consideration for covenants against all acts, rightful or wrongful; for, the office of bailiff is a continuing office, and he gets a profit on each act, and this, therefore, may well be taken to be a covenant as to each particular act.

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The word return must mean rightful return, or else what is the use of the subsequent words mis-return, and no return?

[*Bayley, B.*—Try it in this way: Could the Sheriff recover the extra costs in an action in which he succeeds?]

Yes; or if he were to succeed and recover costs against an insolvent, it is submitted that this instrument would protect him. The whole scope of the covenant is to put the bailiff in the place of the Sheriff, and the words ought to be taken most strongly against the covenantor. The instructions from which to make the return of the writ, are surely the act of the bailiff, and against his *act* the covenant expressly protects the Sheriff. By a preceding covenant, also, the Sheriff is to be indemnified against the costs or charges, &c., &c., touching or concerning any matter wherein the bailiff should *act, or assume to act, as bailiff to the said Sheriff.*

Manning, contra.—This is an attempt to fix the executor of a deceased surety, contrary to the policy of the law, and the contract of the parties. The poundage is the legal indemnity to the Sheriff against the risks of office; and this he reserves to himself, whilst he attempts to throw on the surety the risk which the law intends that he should bear. But the words, “occasioned by the act or default of the bailiff,” &c., over-ride the whole of the preceding clause. The word “default” clearly means a wrongful “not-doing;” and then the word “act,” on which reliance has been placed, will mean a wrongful doing. So, the common covenant for quiet enjoyment without the let of grantor, &c., or any other person soever, is confined in construction to the *lawful* let only (a). If such construction arises from the nature of the instrument on the covenant for title, surely, *a multo fortiori*, the words “by the act or default of the bailiff,” must be construed to confine the indemnity to the *wrongful*

(a) *Dudley v. Folliat*, 3 T. R. 584.

act, or default of the bailiff. A correct or true return by the bailiff to the Sheriff can never come within this provision.

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But a preceding covenant was prayed in aid by the other side, by which the Sheriff is to be indemnified from costs, &c., touching or concerning any matter wherein the bailiff should *act*, or *assume to act*, as bailiff. The general words of that covenant, however, are qualified, by there being an express subsequent covenant as to returns, which is restricted to injuries arising from *wrongful acts or defaults*.

The breach in question is bad, for it does not shew what is become of the action by *Wilton*. That action may be still pending, and if the plaintiffs might recover without shewing an end to the suit (as they must do in cases of malicious prosecutions), the bailiff might be fixed with a fresh action, *de die in diem*, for every shilling expended from time to time in the progress of the suit; and that, though the Sheriff were sure of receiving the whole costs from the opposite party at the end of the suit. Besides, the breach does not state that the expenses were incurred *necessarily*. If they were incurred wantonly, they surely do not fall within the meaning of this obligation. They should either be stated to have been incurred necessarily, or with the assent and concurrence of the parties to be charged. In this breach, neither of these facts is stated; and the present appears to be an attempt to saddle the representatives of the surety with expenses which the Sheriff has wantonly incurred, by choosing to mix himself up as a party in the litigation.

[*Bayley, B.*—You have not pleaded, that, if any damage were sustained, it was wrongfully sustained by the Sheriff.

Lord *Lyndhurst, C. B.*—If the expenses had been wantonly sustained, the part of the breach which states that “the plaintiffs, by *reason thereof*, sustained loss,” &c., would not be true].

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Burchell, in reply.—The words “by reason thereof” clearly imply, that the loss was sustained necessarily by the plaintiffs.

LORD LYNTHURST (*a*), C. B.—The substantial question intended to be raised upon this record, and which was discussed yesterday, is, whether, when the bailiff has acted properly in the discharge of his duty, by making a proper return to the Sheriff, for which return an action has been brought against the Sheriff, and costs and charges have been incurred by him, the bailiff and his surety be liable for such costs and charges. It appears to me, that the case I have stated falls distinctly within the language of one of the covenants; and, on looking through the rest of the instrument, for the purpose of ascertaining whether there is any other covenant or provision to qualify or restrain the meaning of the one in question, it does not appear to me that there is any thing to justify me in declining to put upon the covenant I have alluded to the meaning which its terms naturally import. The part of the deed to which I refer is this, “that the bailiff shall pay, &c., to the Sheriff, &c., the costs and charges of defending any action, and of promoting or opposing any motion in, or application to the Court, touching or concerning any matter wherein the bailiff should act, or assume to act, as bailiff to the said Sheriff.” In this case, the bailiff pointed out the return to be made on the writ. On that return, an action was brought against the Sheriff, and costs and charges were incurred by him. These, therefore, were costs and charges in defending an action in a matter wherein the bailiff acted as bailiff to the Sheriff, the now plaintiffs. They therefore fall precisely within the words of the deed, and I see nothing to prevent those words from

(*a*) The judgment of the Court was pronounced the day after the argument.

taking effect. With respect to the other covenant, I should feel more difficulty. The Sheriff by that is to be indemnified against any loss that may arise from the *act or default* of the bailiff. Now, if the bailiff acts properly, and gives correct instructions for the return, and a third party brings an action for such return, it does not appear to me that the loss happens through the act or default of the bailiff, but rather from the act of the third party, who has chosen to bring the action. The same reasoning is applicable to the remaining covenants. My opinion proceeds on the ground that the covenant to which I first referred embraces the present case.

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An objection was taken to the terms in which this breach was assigned. It was said that it should have stated that the expenses were necessarily incurred; but I think that it was more correct to follow the words of the covenant, in assigning the breach, as has been done in the present case. I think, therefore, that there is no ground for objecting to the present declaration, and that there should be judgment for the plaintiffs.

BAYLEY, B.—My opinion agrees with that which has been expressed by Lord *Lyndhurst*, and it is founded on that part of the covenants to which he has referred. The Sheriff may select such persons as he chooses to execute process for him, and may impose such terms in selecting any particular person, as such person and his sureties may acquiesce in. The covenant contains a stipulation on the part of the bailiff and his sureties, that they will pay to the Sheriff, &c., all costs, &c. &c., touching or concerning any matter wherein the said bailiff should act, or assume to act, as bailiff to the said Sheriff. Now, there is no doubt, on the terms in which this breach is assigned, that the plaintiffs have averred that they have incurred costs in a matter in which the bailiff has acted as bailiff to the Sheriff,

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and therefore, unless there be something in the rest of the deed to justify us in putting a different construction upon this covenant from what its words would *primâ facie* import, the Sheriff has a right to call upon the sureties of the bailiff to reimburse him as to these costs. Now, on looking at the other stipulations, I see nothing which will justify us in putting a different construction upon the covenant in question, from that which it naturally bears, or which should prevent us from putting the same construction upon it as if it stood *simpliciter*, by itself.

The early part of the instrument points out the duty of the bailiff. It then proceeds to mention the instances in which the Sheriff may be put to expense, [the learned Baron here read that part of the instrument], and afterwards come the stipulations for indemnifying the Sheriff. Now, the general scope of these stipulations is perhaps rather to embrace those cases in which the bailiff may be in some respect to blame; but some of the concluding ones would, I think, justify the Sheriff in calling upon the bailiff or his sureties, to indemnify him against the consequences of acts of the bailiff in which he has not been to blame. The Sheriff may be injured in consequence of the acts of the bailiff, though the latter has acted properly in every respect; and I think that it was the intention of this instrument, that the Sheriff should be indemnified whether the bailiff were innocent or not. There is no reason why the Sheriff should not take an indemnity to secure himself from loss arising out of transactions where he and the bailiff are both innocent.

If it could be said that the Sheriff had, of his own wrong, been put to these expenses, so that the blame would rest upon him, then, as his own wrong would have been the cause of the damage, he would be the proper party on whom the loss should fall, and he could not call upon the bailiff or his sureties to indemnify him. But, on the face of this record, we cannot say that the Sheriff

is to blame; and he must be taken, on these pleadings, to be an innocent party. *Each. of Pleas, 1831.*

I am therefore of opinion, that, upon the true construction of this instrument, the plaintiffs are entitled to recover the expenses in question, and, consequently, our judgment must be for the plaintiffs.

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VAUGHAN, B.—I concur entirely with the rest of the Court. This is a demurrer to a plea which professes to be an answer to the seventh breach assigned in the declaration in this case. It becomes necessary to see what is the nature of the covenants, and whether those covenants do not reach the facts in question. It has been argued that the covenants only indemnify against the wrongful acts of the bailiff; but, upon this breach, it is at least doubtful whether the conduct of the bailiff can be called an innocent act. In looking at the stipulations of the instrument, one cannot help seeing that this instrument is drawn with particular accuracy and care. The earlier stipulations are more general, and as they proceed they become more special and minute. [The learned Baron then went through the covenants, and compared them with the breach]. It is impossible to have words more general or better adapted to meet every case, not only of wrongful but of innocent acts; and I know of no law which prevents the Sheriff from so guarding himself against the acts, whether rightful or wrongful, of the bailiff, or the bailiff from agreeing to such stipulations, if he choose so to do. It appears to me that these stipulations distinctly comprehend the case of the costs which have been incurred in defending the action; and, therefore, I am of opinion that the plaintiffs are entitled to our judgment.

BOLLAND, B.—It has been submitted to the Court, that this is an attempt to fix the surety, contrary to the policy of the law, and to the intention of the parties. It is not,

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however, contrary to the policy of the law; for it is merely a contract between two individuals for the sharing of responsibilities which may arise from the one placing the other in a particular situation, the one being free to offer, the other to accept or refuse the terms offered. Nor do I see any thing contrary to the intention of the parties, as expressed by them in this deed. Looking at the whole of the contract, it seems to me to be perfectly clear that the intention was, that the covenant should cover all expenses incurred by the Sheriff, whether they arose from the proper or improper acts of the bailiff. Then comes the question, whether the contract is framed so as to carry this intention into effect. The Sheriff is to be indemnified from and against "all costs, &c. which he might pay or be liable unto, for or by reason of" (then come the causes from which the above consequences are to flow,) "*the executing, not executing, returning, or not returning, or mis-return of any writ, process, &c. occasioned by the act or default of the bailiff.*" I should feel inclined to give a larger construction to those expressions than has been given by the Lord Chief Baron. I do not say that the expression "act or default" is merely tautologous; but I think that without it the construction would have been the same; for the words "returning, non-returning, or mis-return," &c., seem to have completely embraced the case in question: and when I look at the earlier parts, to see whether the indemnity was to extend to the acts of others as well as of the bailiff, I think the words bind the bailiff to take upon himself, if not all, at least many liabilities incurred by the Sheriff from the acts of third parties. In the latter part, the words "returning," &c. contemplate the mere act of the bailiff; and, whether that be rightful or wrongful, the bailiff clearly stipulates to indemnify the Sheriff against its consequences. I think, therefore, that the construction which the plaintiffs seek to put upon this agreement is neither contrary to the policy of the law nor to the inten-

tion of the parties, and that the plaintiffs are entitled to the judgment of the Court.

Judgment for the plaintiffs.

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AFTER the judgment, *Manning* prayed to amend; but the Court refused to allow it, observing, that, even after argument, a demurrer could not be withdrawn unless upon an affidavit shewing that the justice of the case required a trial upon the merits.

MILLAR v. BOWDEN.

ON a former day *Channell* had obtained a rule to shew cause why the service of a *quo minus* should not be set aside for irregularity, with costs, upon the ground, that the day of the month and year on which the same was issued was not indorsed upon the process, in pursuance of the rule M. T. 1 *Will. 4 (a)*.

The rule of Court which requires the day of the month and year to be indorsed on the process, is merely directory; and the Court will not set aside the service of process, because there is no such indorsement upon it.

John Jervis shewed cause.—The rule of Court is merely directory, and the indorsement is no part of the writ. *Coleby v. Norris (b)*. He further produced an affidavit which stated, that, immediately upon the rule being served, the plaintiff's attorney requested the defendant's attorney to point out the irregularity, and offered to waive the proceedings, to which no answer was returned, and contended, upon the authority of *Beeston v. Beckett (c)*, that, if the rule were made absolute, it could only be upon the terms of the defendant paying all costs incurred subsequent to the notice.

Channell, contra.—The rule ought to be made absolute.

(a) *Ante*, p. 274.

(b) 1 Wil. 71.

(c) 4 M. & R. 100.

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It is of great importance to a defendant, who is called upon to appear to process, to know the day on which it issued. Suppose, for instance, his defence to the action is a tender: How is he to know, but from the indorsement on the writ, when it issued? The service gives him no information; for that may have been, and often is, many days after the writ was sued out; and a defendant who may have believed himself to have made a tender, *bond fide*, and in sufficient time, may find, when the writ is produced at the trial, that his tender was too late, and thus be defeated in what was meant to be, and is now considered, an honest defence to the action. It is true, he may search at the proper office, and so ascertain when the writ issued; but, a defendant ought not to be put to that trouble and expense. Other reasons may be given to shew the importance to a defendant of the information which this writ withholds. Suppose, again, his defence is the statute of limitations.

[Lord *Lyndhurst*.—It is not pretended by you that the defendant in this case has sustained any inconvenience].

This affidavit, it must be admitted, does not disclose any, and, perhaps, none may have arisen; but the question must be considered upon general principles. One object of the rule of Court unquestionably was, to give defendants in this Court advantages, which, as to this point, defendants have long had in the other Courts of law; and the rule being express in its terms, and one of which the plaintiff's attorney must be presumed to have been aware, his client ought not to be allowed to avail himself, at any rate, of the service of a writ, or of the writ itself, when it is not in conformity with an express rule. The surest method of enforcing attention to rules of practice is, to set aside proceedings which manifestly disregard those rules. As to the affidavit relied on by the plaintiff, that may, indeed, be a ground to induce the Court to refuse the defendant the costs he has asked for, but that is all. Surely

a party who admits himself to have been guilty of an irregularity, is not to say, you may, if you please, take advantage of it, but you must first purchase your right to do so, by paying me my costs of appearing upon the very proceedings by which the irregularity is brought under the consideration of the Court.

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LORD LYNTHURST, C. B.—I am of opinion that the rule of Court is merely directory, and that this is not such an irregularity as calls upon the Court to set aside the service of the process. But, as this is the first application under the rule of Court, this rule must be discharged without costs.

BAYLEY, B.—I am of the same opinion. In *Shaw v. Evans* (a), the Court of King's Bench held that a rule of Court applicable to warrants of attorney was merely directory.

Rule discharged without costs.

(a) 10 East, 576.

GLEDSTANE v. HEWITT.

DETINUE on bailment of a promissory note, delivered by the plaintiff to the defendant, to be redelivered on request. Averment of a special request (a).

Plea, that before the exhibiting the bill of the plaintiff, to wit, &c., the plaintiff delivered the said promissory note to, and deposited and lodged the said promissory note with,

To a count in detinue, on the bailment of a promissory note to be redelivered on request, the defendant pleaded, that the plaintiff had deposited the note with him,

to be kept as a pledge and security for the repayment of a loan of 50l.; the plaintiff replied, a tender of the 50l.:—*Held*, on special demurrer, that the replication was good, and no departure.

(a) There was a second count on a finding.

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the defendant, to be by him kept as a pledge and security for the repayment of a certain sum of money, to wit, the sum of 50*l.*, then lent and advanced by the defendant to the plaintiff, upon the faith and security of the said promissory note, and which said sum of 50*l.* had not at any time before the exhibiting the bill, &c., been repaid to the defendant, but still remained wholly due and unpaid. By reason whereof, the defendant from thence hitherto detained, and still detains, &c. &c.

Replication, that the plaintiff, after the said deposing and lodging the said promissory note with the defendant, and before the exhibiting the bill, &c., was ready and willing, and then and there tendered and offered to pay to the defendant the said sum of 50*l.*, and then and there required the defendant to redeliver up to him the said promissory note, which the defendant then and there wholly refused to do; wherefore, &c. &c.

Special demurrer, shewing for cause, that plaintiff had, in his said replication, departed from the declaration, and relied upon a new ground of action, and that the matters alleged in the replication did not support the declaration, but were inconsistent with it.

Cresswell, in support of the demurrer.—This replication is a departure; it does not support the declaration, but it contains matter which would defeat the right of action as stated in the declaration. The contract stated in the plea, and admitted by the replication, is totally different from that stated in the declaration. The one alleges a general bailment, the other a bailment for a special purpose, which may be, and ought to be, traversed in the replication.

In *Kettle v. Bromsall*(a), the delivery in the declaration to be safely kept, differed from the delivery to take care of, as

(a) Willes, 120.

his own proper goods, &c., as alleged in the plea; and the replication, therefore, was held to have rightly traversed the only material part of the plea. Lord Chief Justice *Willes*, in giving the opinion of the Court, observed—"The only material part, therefore, of this plea is, whether the goods in the declaration were delivered to the defendant only to take care of them as his own, &c., and this fact the plaintiff has traversed." In the present case, the plaintiff ought to have traversed the material part of the plea, which sets up a bailment inconsistent with the delivery in the declaration.

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Mills v. Graham (a) is an authority to shew that this is a departure; for, in that case, it was distinctly held at the trial, that the first count of the declaration, which stated a bailment of goods to be redelivered upon request (as in the present case), was not supported by evidence of a bailment for a special purpose; and the plaintiff retained his verdict on the second count, which was on a finding. Sir *James Mansfield*, C.J., says in that case: "A bailment of goods to be redelivered imports an agreement to redeliver; all special bailments import a contract to redeliver *when the purpose for which the goods were deposited is answered*." The two contracts are therefore essentially different; and as the declaration states the one, the replication, which admits the other, is bad, as departing from the declaration.

Wightman, contra.—The gist of the action of detinue is the detainer; *Isaac v. Clarke* (b); and the replication does support the declaration, because it shews the detainer to be unlawful; it cannot, therefore, be said to be a departure, for a departure is where the replication contains matter which does not support, but defeats the declaration, and varies from it in some material part.

(a) 1 New Rep. 140.

(b) 1 Roll. Rep. 128; Bull. N. P. 51; 2 Bulstrode, 306.

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The bailment clearly is not the gist of the action, nor is it traversable. *Bro. Ab.* title "*Detinue de Biens*," pl. 50. In *Mills v. Graham*, the Court did not decide that a special bailment was traversable; and Mr. Justice *Chambre* particularly guarded himself from being supposed to say, that such special bailment might be traversed. *Bateman v. Ellman* (a) is a conclusive authority in favour of the replication in this case. There, the count was on a delivery of plate, to be restored on the 17th *May*. A special verdict was found, by which it appeared, that the plaintiff bargained and sold the goods to the defendant by indenture, on condition, that, if a sum of money was paid on the 17th *May*, the bargain and sale should be void; and they found the payment of the money on the day. It was objected, that there was not any delivery by bailment, but by bargain and sale; but it was held well enough, for, the condition being performed, he ought to have them again, and then the detainer is a tort.

The facts found in that case supported the declaration; and, in the same way, the facts appearing on this replication maintain the declaration, by shewing that the detainer after the tender was wrongful.

Cresswell, in reply.—The detainer being the gist of the action of detinue, shews nothing as to the form of the pleadings. If a plaintiff undertake in his declaration to set out a contract, he must prove it in evidence, and must not depart from it in pleading. The non-payment of money may be called the gist of an *assumpsit* for such non-payment; but, if the plaintiff allege a special contract to pay such money, he must prove it. *Kettle v. Bromsall* shews that the special contract is material in the action of detinue, and that it may be traversed; for it was traversed in that case.

(a) *Cro. Eliz.* 866.

[Lord *Lyndhurst*, C. B.—The general bailment laid in the declaration pledges the plaintiff to the proof of nothing, except that his goods were in the defendant's hands, and were wrongfully detained. The first contract that is traversable is the one alleged on the part of the defendant.

Bayley, B.—Would the plea be good if it concluded with a traverse of the general bailment?]

It would be good, unless demurred to specially as amounting to the general issue. In *Bateman v. Ellman*, the bailment laid was to redeliver on a particular day, and not on request. So soon as the day was past, the defendant was bound to redeliver without request; and the performance of the condition after which the defendant would be bound immediately to deliver, made that a general bailment, which otherwise would have been special. However, in that case there was no question on the face of the pleadings, but the objection was, that the goods were bargained and sold, and not bailed.

Lord *LYNDHURST*, C. B. (a).—The question raised by this demurrer is, whether the replication is a departure. The declaration is in detinue, upon a bailment in the ordinary form, to be redelivered on request. We are of opinion, that, in the action of detinue, the detainer is the gist of the action, and that the bailment is merely inducement. Otherwise, in the cases where a bailment different from the one in the declaration is stated in the plea, it would have been necessary for the defendant to have traversed the bailment laid in the declaration.

In *Bateman v. Ellman*, it was determined that the bailment laid in the declaration was not material. I am therefore of opinion that there is no departure, and that our judgment must be for the plaintiff.

(a) The judgment of the Court the day next after the argument. In this case, was not given until

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BAYLEY, B.—I am of the same opinion. The declaration states the delivery to the defendant of a certain note, to be redelivered to the plaintiff upon request. Now, the nature of the action of detinue is, that the detainer is the gist of the action.

The plaintiff must make out that he was entitled to the delivery of the article, and that the defendant wrongfully detained it; and if he can do that, he has done all that is necessary to maintain his action. He is not bound to shew the circumstances under which the article came into the defendant's hands. It may come into the defendant's hands by bailment, by pledge, which is a species of bailment, by finding, or by other means. The action of detinue is an action of wrong, and it is only necessary to prove so much as is material; and the question in this case is, whether the allegation, that the note was to be redelivered on request, is essential, to entitle the plaintiff to recover in this case. The defendant pleads, what in substance amounts to this, that the note was delivered on pledge, namely, that he was to hold it until the plaintiff paid him 50*l.*, which is a different bailment from that stated in the declaration. If the declaration is to be considered as binding the plaintiff to a contract to redeliver on request, the defendant's plea should have concluded with a traverse; it should have stated, that the note was delivered by way of pledge, and have traversed that it was delivered to be redelivered on request. That would have been essential, if the bailment in the declaration were material; but the authorities shew that such a traverse is not the common course of pleading; and the defendant must shew such a delivery as will give him a continuing right to withhold the article. If the plaintiff means to insist, that the article was not delivered on the terms mentioned in the plea, he is at liberty, in his replication, so to do; but it is not for the defendant to tie him down to the bailment stated in the declaration by a traverse. If the plaintiff does not mean to deny the terms

which are stated in the plea, he may shew that, even upon those terms, the defendant has no right to withhold. Therefore, to a plea of this description, the plaintiff has the option to deny the species of delivery on which the defendant insists, or to shew such circumstances as, admitting the delivery, establish that the defendant is guilty of a wrongful detention. As it seems to me, that is clearly to be deduced from the case of *Bateman v. Ellman*, and the other authorities on the same point. In *Bro. Detinue de Biens*, pl. 50, it is said: "In detinue, it is no plea that plaintiff did not bail as laid, for the bailment is not traversable, and the defendant shall answer to the detinue." So, *Dyer*, fol. 29 b, in detinue for forty quarters of wheat, the plaintiff declared simply on a contract for wheat, &c.; the defendant pleaded, that the plaintiff bought of him eighty quarters, upon condition, that, when plaintiff came for the wheat, he should pay immediately, or otherwise the whole to be void; and further, that the plaintiff had received thirty quarters, and paid him for them; and at another day came and received ten quarters, and had not paid for them, so that the contract became void; thus, not traversing the contract as stated in the declaration, *simpliciter*, but going on to state circumstances which would justify him in withholding the corn. Then the question was raised, whether the defendant ought not to have concluded his plea with a traverse, because it was said, the plaintiff states an unconditional contract, which binds the defendant to deliver, at all events, and the defendant says it is a conditional contract:—No, said the Court, that ought to come from the plaintiff. If the plaintiff mean to insist that there was not such a contract as that stated in the plea, but such as his declaration implies, he should state it in his replication. Now, that case shews that the statement in the declaration is not a statement which binds the plaintiff, but that he is at liberty, afterwards, to answer the plea of the defendant. The defend-

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ant must shew that the bargain stated by him justifies him in that which is the gist of the action, the detainer; and then the plaintiff is at liberty to deny the contract as the defendant states it, or to shew (that being the true contract) that there is a wrongful detention on the part of the defendant. *Bateman v. Ellman* is exactly analogous to that case which I have mentioned from *Dyer*. The plaintiff declared *simpliciter* on a bailment to the defendant of plate, to be redelivered on the 17th *May*: on a plea of *non detinet*, which put the whole of the declaration in issue (as it seems to have been considered in *Mills v. Graham (a)*), the Jury found specially, that the goods were bargained and sold to the defendant by indenture, on a condition, that, if the plaintiff paid such a sum upon the 17th *May* following, the bargain should be void, and they found that the money was paid on that day. No doubt that was a finding of a delivery on different terms from those stated in the declaration; but the Court said it was well enough, for, the condition being performed by payment of the money, the plaintiff ought to have the goods again, and then the detention is a tort. That case, as it seems to me, shews that the plaintiff is not tied down to the terms of bailment stated in his declaration. In the case of *Kettle v. Bromsall*, the plaintiff declared on a bailment to be safely kept, the defendant said, they were delivered to me to be kept *as my own proper goods*, and I was robbed. That would have constituted an excuse; the loss would fall not on the defendant, but on the owner of the goods. Now, if the allegation of the delivery to be safely kept was a traversable allegation, the defendant was bound by the rules of pleading to have traversed it; but it is the plaintiff who denies the allegation that he delivered the antiques to be kept as the defendant's own goods; and on demurrer the Court held the replication good, because the traverse was taken on the

(a) 1 N. R. 140

material part of the plea, and the loss by the plaintiff would or would not be an excuse, according to the terms of the bailment, whether to be safely kept or to be kept as the defendant's own. Therefore, that case, as it seems to me, is consistent with the others, and, instead of being an authority for the defendant, is an authority for the plaintiff. The case of *Mills v. Graham* is a case in which it is impossible to say that the Court came to any thing like a judicial decision upon the present point. The first count in that case was on a bailment to re-deliver on request—the second count was on a finding; it turned out in evidence that the goods were delivered in order that the defendant might do certain work upon them; and Lord Chief Justice *Mansfield*, on the trial, thought that the goods had not been delivered on the terms stated in the first count, but that the plaintiff was entitled to a verdict upon the second count. It was immaterial whether he had a verdict on the count upon the bailment or on that upon the trover. On an application to enter a nonsuit, the question, whether the particular delivery stated was essential to be proved, was much discussed at the bar, but not by the Court. Lord Chief Justice *Mansfield* by no means gives an opinion that the plaintiff was bound to prove the delivery as alleged—He says, “no case has been cited to prove that where the detention is wrongful, the declaration may not always be supported upon an allegation of finding; though perhaps in cases of special bailments, it may be fit to require that the plaintiffs should declare specially, yet I will not say that it is necessary even in these cases.” Mr. Justice *Chambre*, that very able pleader, “would not say whether a special bailment ought to be set forth or not, and whether such bailment might be traversed, but was far from saying that it might.”

Thus, the authorities seem to shew, that though a bailment is stated in the declaration, it is not an essential part

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of the declaration, and that the plaintiff may or may not, at his election, in his replication, make the terms of the delivery material; but it is for him only to do so; and he is not tied down to the species of bailment stated in his declaration: and if he can make out that he was entitled to the possession and re-delivery of the goods, and that the defendant wrongfully withheld them, he will be entitled to recover.

VAUGHAN, B.—I am of the same opinion. In *Bro. Ab.*, title "*Charter de Terres & detinue de eux*," pl. 22 (a), there is an authority to shew that the bailment is not a material allegation.

BOLLAND, B.—I concur with the rest of the Court. A departure must be in something material. *Lee v. Rogers* (b). The gist of the action of detinue is the detainer, and it does not appear to me that the allegation which the defendant says has been departed from, is material.

Judgment for the plaintiff.

(a) "In detinue of charters, the plaintiff counts that they were delivered to Sir H. N. to safely keep, and that, after his death, the same charters came to the hands of the defendant, and does not shew how,

whether by bailment, trover, or as executor, or otherwise; and the opinion of the Court was, that the count was good." *Bro. Ab. ubi supra*.

(b) 1 Lev. 110.

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COVENANT for arrears due on an annuity deed, whereby one *Stewart*, and the defendant, as his surety, granted an annuity of 120*l.* to the plaintiff, for the term of the joint natural lives of the plaintiff, *M.* his wife, *M. A. H.*, and *L. D.*, and the lives and life of the survivors and survivor of them; and covenanted, within thirty days next after the decease of such three of them, the said plaintiff, *M.* his wife, *M. A. H.*, and *L. D.*, as should first depart this life, to insure in some respectable office of insurance in *London*, for the use of the said plaintiff, his executors, administrators, and assigns, the sum of 1000*l.*, to be paid on the decease of the survivor of the said lives; and upon the completion of such insurance, to assign the policy or policies unto the said plaintiff, his executors, administrators, and assigns, for his and their sole use.

The defendant set out the deed on oyer, and pleaded, that, before the making of the said indenture, to wit, &c., it was corruptly, and against the form of the statute in that case made and provided, agreed, as therein mentioned, that the plaintiff should lend and advance the money in the said indenture in that behalf mentioned, upon the terms, stipulations, and agreements, and in manner and form therein mentioned; and that the said defendant should execute and deliver the said indenture for securing the repayment thereof in manner aforesaid, and according to the terms and stipulations therein also mentioned; that, in pursuance of such corrupt and unlawful agreement so made as aforesaid, the said plaintiff, to wit, on &c., lent and advanced the money in the said indenture mentioned, upon the terms, stipulations, and agreements, and in manner and form as in the said indenture mentioned; and the said defendant made and sealed, and as his act and deed delivered the said indenture to the plaintiff, and the plaintiff

The grant of an annuity for the term of four lives, and the lives and life of the survivors and survivor, contained a covenant by the grantor, within thirty days after the decease of the third life which should drop, to insure 1000*l.*, (the amount of the consideration), in some insurance office, for the use of the grantee, to be paid on the decease of such survivor:—*Held* not usurious.

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then and there accepted and received the said indenture of and from the defendant, in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid. Averment, that the said annual sum of 120*l.*, agreed to be paid to the plaintiff as in the said indenture mentioned, exceeds the rate of 5*l.* for the forbearance and giving day of payment of 100*l.* for one year, contrary to the form of the statute, &c., by means whereof, and by force of the said statute, the said indenture was and is wholly void in law, &c. &c.

Demurrer and joinder.

Hutchinson, in support of the demurrer.—The question arises on the covenant at the latter end of the deed, by which the grantor, within thirty days next after the decease of such three of the four lives as should first depart this life, is bound to insure the life of the survivor. Whether this covenant to insure renders the deed void for usury, is the question for the consideration of the Court. The case has been before the Court of *Common Pleas* in another shape, and was decided by them (a).

There is nothing which shews this to have been a loan of money; it was a purchase of the annuity. The covenant to insure is in favour of the grantor, who would have to pay less by way of annuity than if he had to pay the grantee to enable him to insure during the whole period. Many cases establish that the grantor may covenant to insure.

[Lord *Lyndhurst*, C. B.—The amount of the premium might have been added to the annual sum.]

In effect, that is always done in one way or the other.

(a) In the matter of *Naish*, Executrix of *Stewart*, on motion to set aside the warrant of attorney, given to secure the annuity, on the

ground of usury. 7 Bing. 150; and see *Grigg v. Stoker*, Forrester, 4, cited by *Alderson*, J.

In *Cummins v. Isaac* (a), where the very same objection might have been taken, it was not pretended that the contract was usurious on account of such a covenant, but the objection was on the ground of the defect in the memorial. *Morris v. Jones* (b) recognises the legality of a transaction of this nature.

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[Lord *Lyndhurst*, C. B.—There is an interval of thirty days, during which the capital might be lost. The premiums are always added in one shape or another. Here, it could not be calculated at what time the three lives would drop, and it is arranged as economically as possible. There is the express opinion of the Court of *Common Pleas* in this very case.]

R. V. Richards, contra.—The defendant is entitled to the judgment of the Court, on two grounds—*First*, the deed is usurious on the face of it—*Secondly*, at all events, as a corrupt and usurious bargain is stated in the plea, the plaintiff ought to have traversed it, that a Jury might say whether the bargain was or was not usurious, as alleged in the plea. Though it is usual for the grantees of annuities to insure for their own security, this is the first case in which there has been an express covenant by the grantor to insure the lives. The effect must be, that, when the third life has dropped, the grantee will be recouped and entirely secured as to his principal. Is there, then, any such risk as to give the transaction the character of a purchase, and to prevent its being a loan? The risk, if any, is inconsiderable and colourable. There is no real hazard as was held to be the case in *Bedingfield v. Ashley* (c), where the Court considered the transaction not usurious, because there “was a great hazard, but that in ten years all or some of the daughters would be dead;” but they

(a) 8 T. R. 183.

(b) 2 B. & C. 232; S. C. 3 Dow. & Ryl. 263.

(c) Cro. Eliz. 741.

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intimated that if the risk had been inconsiderable the bargain would have been usurious. So, in *Richards v. Brown* (a), it was held, that where more than 5 per cent. is taken, if the substance of the contract be a borrowing and lending, a slight colourable contingency only will not take it out of the statute of usury. The same principle was stated by the Court in *Murray v. Harding* (b), citing *Roberts v. Trenayne* (c), and *Fountain v. Grimes* (d). Trying the present case by the test established in the authorities referred to, is there not here a reasonable possibility (to use the expression of *De Grey, C. J.*, in *Murray v. Harding*), that the principal will be repaid. It cannot, surely, make any difference whether the principal is to be returned by the hand of the borrower, or by that of another person, through the instrumentality of his contract.

[*Bayley, B.*—The borrower may not be a shilling out of pocket; he may be 500*l.* in pocket.

Lord Lyndhurst, C. B.—You assume, that the money paid by the office is the money of the borrower. Is there any instance in which a transaction has been treated as a loan, where the money is not to be repaid by the borrower?]

The statute of usury does not seem to make any such distinction. The general course, no doubt, in such transactions, may be, that the grantee takes a larger amount of annual payment, and he himself effects the insurance. That, however, makes the difference; for, in that case, upon the face of the deed, it does not appear that any insurance is to be effected; and it is for the grantee himself to insure or not, as he shall choose. In *Wilson v. Marsac* (e), which was a question as to the validity of a *post obit* bond, the Judges said, that it was impossible for them to say whether the trans-

(a) Cowp. 770.

(b) Sir W. Bla. 859.

(c) Cro. Jac. 507,

(d) Id. 253; 1 Bulst. 36, 37.

(e) King's Bench.

action was a usurious loan of money or not, but that it was a question for a Jury to decide. *Each. of Pleas, 1831.*

[*Bayley, B.*—In that case it was ultimately considered, that no part of the principal was in hazard. The lender was to receive all his principal back from the borrower, and was to get greater interest than 5 *per cent.*]

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Suppose the borrower had himself covenanted to pay within thirty days after the falling in of the third life; that would clearly be usury.

[*Bayley, B.*—He did not so covenant. If the office were insolvent, he would not be bound to pay.

Lord *Lyndhurst, C. B.*—He is not personally answerable if the office fail].

He would be liable in damages if he did not insure; so that, one way or another, he would have to pay. In fact, by paying the premium, he does pay by portions; it is only a different mode of repayment of the whole of the principal by the borrower. The decision of the present case in the *Common Pleas* was on the ground of the absence of proper affidavits, as was expressly stated by Lord *C. J. Tindal*. *Cummins v. Isaacs*, and *Morris v. Jones*, turned on the sufficiency of the memorials.

[*Bayley, B.*—In the case of *Morris v. Jones*, the Court refused to set aside the warrant of attorney; and so the annuity stood, and must therefore have been considered by the Court as valid].

There is this distinction between the present and that case—that, there, the grantor might, if he had pleased, have discontinued the payment of the premium.

Lord *LYNDHURST, C. B.*—It does not appear to me that this is a loan within the meaning of the statute against usury; it is the ordinary transaction of the purchase of an annuity for lives, and the principal is put in hazard, and does not, therefore, fall within the provision of the usury laws. The only question is, whether the covenant

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by the grantor to insure his life, varies this from the ordinary case. In my opinion it does not. It makes no difference whether the grantor covenants to insure, or whether a larger annual sum is stipulated to be paid to the grantee to enable him to effect the insurance. It comes to precisely the same thing, whether the insurance be effected by the one or the other; and for these reasons I cannot consider this to be usury.

BAYLEY, B.—This has been put with great ingenuity by Mr. *Richards*, but I cannot say his arguments have altered the opinion which I have from the commencement entertained. The statute of usury imposes a penalty where a party takes more than the legal interest upon a *loan*. What is meant by the word *loan*? It means that the principal is not in hazard, but is to be returned by the borrower. The statute goes on and avoids all bonds, contracts, and assurances whatsoever for the payment of any money to be lent upon or for any usury, whereby above 5*l.* *per cent.* shall be reserved. This provision, though with a little variation in the language, applies in substance to the same case; it must be on a loan, and, if the principal be in hazard, it is clearly not considered as a loan; and I take it that the principal must be in hazard *as between the borrower and the lender*. If the borrower is the person to return the money, then it is not considered in hazard; but, if the borrower is not the person to return the principal, though it may be returned by some third person through the instrumentality of the borrower, it is not a loan within the statute. In this particular case, it is not clear that the lender will have his money back. There are four lives, and it is probable that they will live more than six or seven years, but this is not certain. If the lives are reduced to two, and they should die within thirty days of each other, the lender might lose the full amount, for there would be no obligation to insure. It is impossible to say

that such an event might not occur; and, unless it is put as a colourable hazard merely, it would not amount to usury. How can it be said that it must of necessity be colourable? How long will the third life last, and of what age will the fourth life be when the third drops? Therefore, the interval of the thirty days may cause some hazard. But we are to look to see how much money must necessarily come out of the pocket of the borrower; it may happen that the lender may ultimately get all the money returned to him with all the interest, yet that the borrower may not pay one farthing. It is put, that the stipulation on the part of the borrower to insure is, in substance, the same as making him stipulate for the re-payment of the money; but, whether the insurance is to be effected by the borrower, or by the lender with a stipulation for an increased amount of the annuity, the transaction is, in substance, the same. In *Morris v. Jones*, it was palpable that part only of the annual sum was for the interest, and that the residue was for the very purpose of paying the premiums on the policies which had been the property of the grantor. In substance, that case is not distinguishable from the present.

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VAUGHAN, B.—I am of the same opinion. This case has been argued upon two grounds—*First*, that the deed is usurious on the face of it;—and *Secondly*, that the plaintiff ought to have traversed the corrupt agreement stated in the plea. But the plea is, that it was corruptly agreed as in the *deed*, which, as it seems to me, refers the question to the Court, whether the deed on its face be or be not corrupt. That depends upon the question whether this is a loan. If, in looking at this deed, the Court could see that it was colourable, so that the principal was not in hazard, the argument for the defendant would be good; but, if the principal be in hazard, the case admits of no doubt. It is put, that the covenant to insure is equivalent to a covenant to

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repay the money: but that is not so; for the principal is in hazard, and might be lost in two events—*First*, on the supposition that the two last lives should expire together; or, *secondly*, if the last should drop within thirty days after the third, so that there would be no breach in the covenant to insure. I am, therefore, of opinion, that this does not amount to a loan of money within the statute against usury.

BOLLAND, B.—I am of opinion that this is not a loan. The character of the transaction is well described, in the deed, by the words “give, grant, bargain, sell, and confirm.” Is there then any thing on the face of the deed to shew that this is a loan and not an annuity? Every body knows that a person who is to advance a large sum of money by way of annuity, will take care to cover himself against the expense of the insurance, either by taking a larger annual sum, and himself effecting the insurance, or by requiring a covenant to insure. Now, in the present case, it is done by a covenant to insure, and cases have been cited in which the Courts have not considered it to be material whether the insurance were to be effected by the one party or by the other. In the case of *Morris v. Jones*, the assignment of the policies already effected on the life of the grantor formed part of the security to the grantee. The Court appear to have considered it as immaterial by whom those policies were effected. The present case falls within the principle of the cases cited. It is not a loan, but the purchase of an annuity; there is nothing on the face of the deed to shew that it is corrupt or colourable, and I am of opinion that there should be—

Judgment for the plaintiff.

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DEBT against the defendants as co-heiresses, on the bond of their ancestor. Pleas—*Non est factum*—that the bond was obtained *per fraudem*—and that the defendants had not, nor had either of them, at the time of exhibiting the bill, &c., nor at any time before or since, any lands, &c., by descent. Replication to the last plea, that the defendants, after the death of the ancestor, and before the commencement of this suit, to wit, &c., had lands in fee-simple by descent, &c.; concluding with a verification.

Upon the trial, at the last Assizes for *Salop*, it was proved, that lands had descended from the obligor to the defendants as co-heiresses, and the Jury found for the plaintiff, debt 1,100*l.*, but did not assess the value of the lands descended, pursuant to the stat. 3 & 4 *W. & M.* c. 14, s. 6 (a).

In *Easter Term*, *R. V. Richards* obtained a rule to shew cause why the plaintiff should not be restrained from issuing execution until a Jury had inquired of the value of the lands descended. He contended, that the plaintiff had replied according to the statute 3 & 4 *W. & M.* c. 14, s. 6, and cited a note to the case of *Jeffreson v. Morton* (b), in which it is laid down, that, “whenever the plaintiff replies according to this statute, he is not entitled to a general judgment, as he was at common law, but can recover only the value of the land sold as found by the Jury, be it what it may. *Redshaw v. Hester* (c). And the Jury must find the value; for, if they neglect to do so, the

To debt against heirs on the bond of their ancestor, the defendants pleaded *non est factum, per fraudem, and riens per descent*; and the plaintiff replied, that, after the death, &c., and before the commencement of the suit, the defendants had lands, &c., by descent, &c.:—*Held*, that this was a replication under the stat. 3 & 4 *W. & M.* c. 14, s. 6, and that the Jury, having found that lands descended, ought to have assessed the value of those lands.

Quere, whether the statute 3 & 4 *W. & M.* c. 14, applies to all lands by descent, or to such only as are aliened before action brought.

(a) The ancestor died before the 16th July, 1830, so that the question turned upon this statute, and not upon stat. 11 *Geo.* 4 & 1 *Will.* 4, c. 47, which came into opera-

tion after that date.

(b) 2 *Saund.* 8.

(c) *Carth.* 354; *S. C. Comb.* 344; 5 *Mod.* 199, 122, 123.

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Jervis and *Curwood* shewed cause.—The pleas of fraud and *riens per descent* are false pleas, within the knowledge of the defendants; and the question is, whether the stat. 3 & 4 *W. & M. c. 14*, alters the law, so as to exempt the heir from the consequences of a false plea, and make it imperative upon the Jury to inquire of the value of the lands descended.

[*Bayley, B.*—This should be considered upon the plea of *riens per descent* alone, because, in the time of *W. & M.* only one plea could be pleaded. The consequences will be the same; for, if the defendants are liable upon that plea, they will be also liable upon the other pleas found against them].

(a) On a former day, *Richards*, treating this as a common law replication, moved for a rule to restrain execution from issuing against the person or goods of the defendants, or against any of their lands, except the land proved to have descended; and produced affidavits proving that the defendants were in ignorance of there having been any lands by descent, and attributing their being misled to the attorney for the plaintiff. The affidavits also shewed facts which had given the defendants reason to suspect and plead fraud in obtaining the bond. He urged the hardship on the defendants if they were to be personally liable for the costs, and for the amount of the debt, which was very large, when they had only one acre of land by descent, and had been misled, or

in ignorance of the facts.

BAYLEY, B.—It would be error on the record, if the judgment, which the plaintiff is by law entitled to, were not given. We cannot give the relief, which, it is suggested, is in the equitable discretion of the Court, if the plaintiff has the clear legal right. The plea of fraud must be proved by the defendants: if they plead fraud, they must prove it; they ought to know whether it be true or false; and, if they plead fraud without any satisfactory evidence, they must pay the debt and the costs. No authority is shewn to us, to enable the Court to confine the execution to a limited extent.

The rest of the Court concurred, and the rule was—

Refused.

(b) 10 Mod. 18, 19.

The cases before the statute are collected *Bac. Abr. Heir and Ancestor* (H); 14 *Vin. Abr.* 241, *Heir* (C); 2 *Wms. Saund.* 8, n. 4, and establish, that, if the heir plead a false plea, as if issue be taken on the quantity of assets, and it be found that the heir has other lands by descent; or if he plead a fact which he knows to be false, and it is found against him, as where he says, that he has nothing by descent, and the Jury find that he has something, however small it may be, and insufficient to satisfy the debt, the plaintiff is entitled to a general judgment for the debt, damages, and costs, and to sue out the like execution against him as on a judgment for his own debt.

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Then, what is the effect of the statute 3 & 4 *W. & M.* c. 14? The 3rd section enacts, that heirs and devisees shall be liable upon the bonds of their ancestors, and the devisees shall be chargeable for a false plea, in the same manner as heirs should have been. The 5th and 6th sections render lands liable which have been aliened before action brought, but do not alter the rule of law which is recognised in the 3rd section. Those latter sections were not intended to affect lands not aliened, but only such as had descended and were aliened before action brought. If these lands had been aliened the plea would not be false. Suppose it had appeared, that lands had descended of which but one acre only had been aliened, could the judgment be for that acre alone? The replication given by the statute is in the nature of a new assignment, and can apply only to lands which have been aliened before action brought. But where lands descend, and are not aliened, the case stands upon the old law, and, upon a false plea, the judgment is general. At all events, the rule cannot be granted in its present form; for, where a Jury have miscarried in not inquiring of the value of the lands descended, it can only be set right by a *venire de novo*.

Russell, Serjt., and *Richards*, contra.—The 6th section

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of the stat. 3 & 4 *W. & M.*, c. 14, is not controlled by the recital to the 5th, but is general, and enacts, that, upon a certain form of replication, the Jury shall inquire of the value of the lands. Now, there is no doubt but that this replication is framed upon that statute; and it is equally clear, upon the authorities already referred to, that in such a case the creditor is not entitled to a general judgment. The case must be determined upon the plea of *riens per descent* alone. At the time the statute was passed, one plea only was allowed; but, if it were otherwise, *non est factum* has been held not to be a false plea, so as to render the defendant liable to a general judgment; *Clothworthy v. Clothworthy (a)*, *Franke v. Stukeley (b)*; and the pleas of fraud are *ejusdem generis*. The judgment, therefore, would be bad, on error, if the value of the lands were not assessed.

Lord LYNTHURST, C. B.—From a very early period I had made up my mind as to the result of this application, and have heard nothing to alter that opinion. In substance, the replication is that which is given by the statute; and the plaintiff having pursued the course pointed out by the statute, all the consequences must follow; and the Jury who tried the cause, should have inquired of the value of the land. They have not done so, and therefore the verdict is imperfect, and a *venire de novo* must be awarded, unless the plaintiff will consent to have the value of the land descended assessed upon a writ of inquiry.

It is unnecessary to say what would have been the effect of an issue taken in the terms of the plea, that the defendants had lands by descent, because the plaintiff has adopted the replication given by the statute, and the legal consequences must follow.

(a) Cro. Car. 436.

(b) 2 Rol. Abr. 71.

BAYLEY, B.—The legal consequence of an imperfect verdict is, a *venire de novo*; and I am of opinion that this is an imperfect verdict, because the replication brings this case within the terms of the statute, and the Jury ought to have inquired of the lands. It is unnecessary to say whether the statute in its operation is general, or confined only to lands aliened before action brought, because that question does not arise upon the present record. This case being within the statute, and the verdict being, therefore, imperfect, it is a matter of right that a *venire de novo* should issue; for, there is this difference between the award of a *venire de novo* and a new trial, that a writ of error may be brought if a *venire de novo* be improperly awarded. Unless, therefore, the parties agree within a fortnight, the *venire de novo* must be awarded.

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THIS was an action of trespass *de bonis asportatis*, for seizing two pairs of shoes. The defendants, after pleading not guilty, justified the trespass, in several special pleas, as wardens of the cordwainers' guild, in the town and county of *Haverford-west*, under a bye-law made in the reign of *Elizabeth*, and another similar bye-law made in the reign of *James the First*, of the corporation of the

A bye-law of a corporation founded on a custom to exclude foreigners, and authorizing a distress for a penalty in case of a breach of the bye-law, without a previous demand and refusal of such penalty, is bad.

Corporators are not competent witnesses in support of a custom to exclude foreigners.

Declarations of deceased corporators are evidence in support of a custom to exclude foreigners—*Seemle*.

Upon an application by a defendant for a new trial, the Court will refuse it if there be an essential defect in the defendant's evidence, although no objection was made by the plaintiff at the trial upon that point.

The recitals of a warrant of distress, put in evidence by the plaintiff to connect the defendant with a trespass, are not evidence for the defendant of the facts recited.

The circumstances which are necessary to make a document evidence, must be proved *aliunde*, and cannot be gathered from the document itself.

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town and county of *Haverford-west*, founded on a custom for the exclusion of foreigners. In those pleas which relied on the latter, the bye-law was stated as empowering the wardens of the cordwainers' guild to distrain the goods of foreigners exercising the craft of cordwainers within the town and county, *after a demand and refusal of a certain penalty*; in those which were framed on the bye-law of the reign of *Elisabeth*, the power of so distraining was averred as existing without any mention of a previous demand and refusal of the penalty. The plaintiff, after joining issue on the plea of not guilty, replied, as to the special pleas, after protesting certain averments, *de injuriâ* to the residue respectively.

At the trial, before *Bolland*, B., at the Spring Assizes for *Pembrokeshire*, the plaintiff, in order to connect the defendants with the trespass, put in the warrant of distress, signed by them, under which the shoes in question were seized; which warrant recited, that there had been a demand and refusal of the penalty authorized by the bye-laws respectively. The case ultimately went to the Jury, upon the question of the existence of the custom to exclude foreigners, and of the bye-laws founded on such custom, as stated in the special pleas. The Jury found a verdict for the plaintiff, negating the custom.

In *Easter Term*, *John Evans* obtained a rule for a new trial, on two grounds—*First*, that the verdict was against the evidence—*Secondly*, that the learned Judge had rejected evidence as to the existence of the custom, which ought to have been received, *viz.* the evidence of certain members of the corporation at large of the town and county of *Haverford-west*, as distinguished from the members of the corporation or guild of cordwainers; entries in the books of the guild of cordwainers; and also the evidence of witnesses who were called to speak to their having heard from deceased members of the corporation at large, that foreigners had no right to exercise the craft of cordwain-

ers within the town and county of *Haverford-west*, and that they had always been prevented from so doing.

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It was not objected, at the trial, by the counsel for the plaintiff, that the defendants had not proved a demand and refusal of the penalty before the distress was levied; but, upon the Judge's report, the Court raised the question whether any evidence had been given upon these points, and whether a new trial could be granted in the face of such a failure of necessary proof in support of the defence stated in the special pleas.

Sir *W. Owen* and *Shepherd* shewed cause.—They contended, that the members of the corporation at large were properly rejected, because the corporation at large was entitled to half the penalty incurred by a breach of the bye-laws, and that the minuteness of the interest did not vary the rule (*a*); that the books of the guild were not of a public character, but contained entries of a private nature for the interest of the parties producing them, and were, therefore, properly rejected; *Rogers v. Allen* (*b*), *R. v. Debenham* (*c*); and that the declarations of deceased corporators could not be received, because the corporators if living would not have been competent; and this was different from the cases in which such declarations *ante litem motam* had been received, because here there was a constant controversy, and each instance of exclusion was *lis mota* within the general principle of the rule.

They urged also, that the bye-law was bad, because part of the penalty was given to the corporation of *Haverford-west*, strangers to the guild of cordwainers; *Totterdell v. Glasby* (*d*), *Bodwic v. Fennell* (*e*); and having cited

(*a*) 1 Phil. Ev. 61; 3 Stark. Ev. 426, 427; *Doe d. Mayor of Stafford v. Tooth*, 3 Y. & J. 19.

(*b*) 1 Camp. 309.

(*c*) 2 B. & A. 185.

(*d*) 2 Wils. 266.

(*e*) 1 Wils. 233, 237.

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1 *Wms. Saund.* (a), and the cases there mentioned, to shew that a bye-law to exclude foreigners could only be founded upon a precedent custom, they contended that there was no evidence of a precedent custom, and that the verdict was therefore right.

John Evans and *E. V. Williams*, *contra*.—The evidence of the corporators was improperly rejected. Such evidence has been received *ex necessitate* in several cases, for the proof of public rights; *Norwich Weavers'* case (b), *R. v. Mayor, &c. of London* (c), *R. v. Carpenter* (d). At all events, the declarations of deceased corporators were clearly admissible. This is abundantly established by *Moseley v. Deacle* (e), *Deacle v. Hancock* (f), *Harwood v. Sims* (g), and *Nicholls v. Parker* (h). It is said, however, that the parties, if alive, could not have been examined; but there is no analogy between the two cases. A living witness must speak to facts: but reputation is founded on opinion, and he who wishes to prove an ancient custom by general reputation, must prove a *general* opinion upon the subject, and may give in evidence the declarations of *all* persons. The entries (i) in the books were also admissible, either as containing a promise against the interest of the party, or as evidence of reputation of the custom at that time.

(a) 312 a, n. 3.

(b) Vin. Abr. Evid. G. pl. 2.

(c) 2 Lev. 231.

(d) 2 Show. 47.

(e) 11 Price, 162.

(f) M'Cl. 85; 13 Price, 226.

(g) Wight 112.

(h) 14 East, 331.

(i) The entries proposed to be read, were in the following form:

" March 31st, 1673.

" *Francis Symmons* was fined to 6s. 8d. for selling of a payer of shoes within the liberty of this

town, and he being not a freeman and free of the corporation, has promised to pay the money the eighth day of July next, as witness his hand. "*Francis Symmons.*"

" 5th November, 1596.

" Distained from *Petro Pearce*, nine pair of shoes for the coming to our towne contrary to our corporation, and 'praised to 6s. by us whose names are underwritten.

" *Wm. Turner.*"

" *Jas Skards.*"

[Lord *Lyndhurst*, C. B.—It does not appear who *Symmons* was. If he was a member of the company or corporation he would be interested; if he was a mere stranger, his evidence of reputation would amount to little.

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Bayley, B.—The character of the evidence must be established before the entry is read; you cannot read the entry to shew that he was a stranger; that must be proved *aliunde* (a). In the *Banbury* case, the depositions under a bill to perpetuate testimony contained many statements with regard to pedigree, and a question was put to the Judges, whether, if they could not be received as depositions, they could be received as declarations. The Judges thought, that, at all events, the depositions could not be received as declarations, unless the individuals whose declarations were supposed to be incorporated in the depositions were *aliunde* proved to be relations (b). And in the *Berkeley Peerage* case, it was holden that the fact of relationship could not be taken from the depositions, but must be proved *aliunde*.]

By putting in the warrant, the plaintiff's counsel made the recitals evidence for the defendants. Like any other admission, the whole must be taken together. But the plaintiff is not in a condition to take that objection now for the first time; for, if it had been made at the trial, the proof of the demand and refusal might have been supplied.

The objections to the bye-laws are upon the record. Here, the only question is, has the trial miscarried?

Cur. adv. vult.

LORD *LYNDHURST*, C. B.—One question which was raised in this case was, whether there was any evidence of a de-

(a) See *Adamthwaite v. Synge*, *Berkeley Peerage* case, 4 Camp. 419.
1 Stark. N. P. 183.

(b) Cited by Lord *Eldon* in

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mand of the penalty which was supposed to have been incurred previous to the distress. The justification was pleaded upon two bye-laws, the one made in the reign of *Elizabeth*, and the other in the reign of *James* the First. By the bye-law made in the reign of *James* the First, a demand and refusal previous to a distress is expressly necessary. It is provided for in the very terms of the bye-law. No demand is required on the face of the bye-law made in the reign of *Elizabeth*, but, according to a form very usual in cases of this kind, it is said, that, in consequence of the offence, or, when the offence is committed, the party shall be subject to a penalty, to be levied by distress. I am of opinion, however, that a demand is, by this bye-law, necessarily implied. If that be so, it brings us to the consideration of this record. The pleas upon the bye-law of *James* the First, state the necessity of a demand previous to the distress; and in the averments in those pleas it is stated that there was a demand and refusal, in consequence of which demand and refusal the distress issued. In like manner, in the other pleas founded upon the bye-law in the reign of *Elizabeth*, though, upon the face of the bye-law itself, no demand is required in terms; yet the person who drew the pleadings seems to have thought that the distress would not be lawful unless a previous demand had been made; and accordingly it is stated in those pleas in the same manner, that the penalty was demanded and refused, and that the distress issued as the consequence of that demand and refusal. In all the precedents which I have consulted of pleadings framed on bye-laws, like that of the reign of *Elizabeth*, I find that previous to the distress a demand and refusal is averred; and it appears to me that such an averment is necessary. The question then arises, was there in this case any sufficient evidence of a demand of the penalty, and of a refusal to pay it? On the part of the defendant no evidence was given for this purpose, but it is said that the plaintiff gave sufficient evidence of that

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fact by putting in the warrant of distress which issued, and which recites a demand and refusal; and it is urged, that, as the plaintiff made use of the warrant containing that recital, that warrant, as taken against the plaintiff, afforded *prima facie* evidence of a demand and refusal. I am of opinion, however, that the use of the warrant by the plaintiff, for the purpose for which it was produced, *viz.* to connect the defendants with the trespass, affords no evidence for the defendants of the truth of the facts recited in that warrant; and that the defendants were bound to prove, by distinct evidence, a demand and refusal before the distress was levied. There was therefore no evidence to sustain the justifications stated on this record; and the Jury were justified in pronouncing their verdict for the plaintiff. It appears to me, therefore, impossible to grant a new trial.

This view of the subject renders it unnecessary for me to enter minutely into the consideration of the other points. I am of opinion, however, that the evidence of corporators was properly rejected, because they were interested in the event of this suit; and that the corporation books were inadmissible in evidence for the purposes for which they were offered. The entry which it was proposed to read could not in my opinion have been admissible, without previously offering some evidence to shew by whom that particular entry was subscribed, and in what situation he stood. Had that been done so as to make his admission evidence, then the lapse of time would have dispensed with the necessity of proving the handwriting. But as no evidence was offered to shew who that individual was, I am of opinion (even if the attention of the Judge had been called to that particular entry,) that it could not, under the circumstances, have been received as evidence.

With respect to the declarations of the deceased burgesses, after considering the cases of *Moseley v. Davies*, *Deacle v. Hancock*, *Harwood v. Sims*, and *Nicholls v. Par-*

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ker, I certainly should have hesitated long before I decided that such evidence was not admissible. However, it is unnecessary to decide that point, because, upon the first ground, I think we ought to refuse a new trial.

BAYLEY, B.—I am of the same opinion, and have the authority of my brother *Garrow* to state that he concurs with the judgment which has been delivered by the Lord Chief Baron. The only point, with respect to the admissibility of the evidence, upon which I entertain the least degree of doubt, is, whether the declarations of deceased burgesses were admissible in this case. The authorities to which the Lord Chief Baron has referred, are powerful on that subject, and although, if the evidence had been admitted, I should have thought in this case it could add very little weight indeed to the other evidence given by the defendants, yet, if it had been necessary to have come to a definite conclusion upon that subject, and I had been satisfied that such evidence ought to have been received, I do not think we could properly have refused to grant a new trial, upon the ground that the bye-laws might be bad in point of law.

But upon the point upon which the Lord Chief Baron has decided, *viz.* that no demand and refusal were proved in this particular case, I am of opinion, that the verdict for the plaintiff was right, and ought not to be disturbed. The warrant was put in evidence for the purpose of proving that the defendants had all concurred in instituting and making the distress in question, and the warrant stated the grounds on which the defendants professed to act in making that distress: but, putting in the warrant for this purpose, makes it, to my mind, no evidence at all of the truth of any of the circumstances contained in it. If it were, it might equally have been proof of the existence of an immemorial custom, or of a bye-law, if it were stated, or of any other fact necessary to exclude the plaintiff from maintaining his action. The bye-law in the reign of King

James directs in terms that there shall be such a demand; and, until such demand, the distress cannot be taken. On that bye-law, therefore, there is no question. The bye-law of *Elizabeth* does not in terms say there shall be a demand of the money before the distress is made; but I am of opinion, either that a necessity to make such a demand must be implied from the nature of this bye-law, or, if not, then I think that the bye-law would be bad, as being unreasonable, under the circumstances of this case. What are the circumstances of this case? The penalty is to be paid, not by a person resident in the town, and therefore of necessity cognizant of its local usages, but by a stranger, one who comes to the market to use it for the sale of shoes, and for other common purposes for which strangers are at liberty to use a market. He brings his shoes to the market, and sells them. It is alleged in the pleadings, that the plaintiff had notice of the bye-law; but there is no evidence of that fact. I think some proof of notice of the existence of the bye-law ought to have been given before the penalty could be enforced by way of distress; and if, from the situation of the party, he was not apprised of the existence of the bye-law, or of his being liable to a penalty, I think the bye-law would be considered as unreasonable, unless it be taken to imply the necessity that there should be a demand of the penalty before the distress could be made. I have looked to find cases applicable to this point, and amongst others there is a precedent in *Lutwych* (a) of a plea of justification in a case of this description. The bye-law there relied on was, that there should be an annual meeting, for the purpose of electing the master and wardens of a company at *Lichfield*, that there should be a dinner, and that the different members should contribute to bear its expense; that, if any member should be absent, he should pay his proportion, and, if he should neglect so

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to do, should pay a fine of 3s. 4d. to be levied by distress. The plea states, that the plaintiff was a brother, that he absented himself, and did not pay, and that he forfeited the 3s. 4d.; and then goes on to allege (an allegation not required in terms by the bye-law, but, as it seems to me, necessary to make the bye-law reasonable, and therefore implied from the nature of the bye-law itself,) that the master and wardens requested him to pay, which he refused, and that thereupon they distrained. The question which was decided in that case not bearing upon the merits of this, it is not necessary to state the decision; but I mention it to shew that in that case, as in this, although the bye-law did not in terms direct that the money should be demanded, yet there was an express and distinct allegation in the pleadings of a demand of the money. In another case, *Clarke v. Tucke* (a), it was pleaded, that there was a bye-law, that any member of a corporation of a company of tailors at *Exeter*, who should revile the master and wardens, should pay a penalty of 3s. 4d., to be levied by distress; and that the defendant, being a member, had reviled the master and wardens, *per quod* he had forfeited 3s. 4d., which was demanded of him, and he neglected to pay. In *Davenant v. Hurdis* (b), a bye-law, that every member of the company who had work to be done, should give a portion of that work to members belonging to the company, and if he should not, he should forfeit 10s. for every *mete* of cloth, with reference to which there should be such neglect, was pleaded, with an allegation that the plaintiff had cut out twenty pieces of cloth, &c., and thereby forfeited the sum of 20l.; and then, though the bye-law does not direct any demand of the money before it shall be levied by distress, it is stated at the conclusion of the plea, that the plaintiff refused to pay the forfeiture, and therefore, the

(a) 2 Ventr. 183.

(b) Moor, 576, cited 11 Rep. 86; Carter, 116. See 2 Inst. 47.

master and wardens made out a warrant of distress. For these reasons and on these authorities I am of opinion that the bye-law would be bad, circumstanced as this case is, if it did not imply the necessity of a demand before any distress could be made; and inasmuch as, in this case, no demand was proved at the trial, we ought not to disturb the verdict.

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VAUGHAN, B., was not present at the argument, and BOLLAND, B., having tried the cause, gave no opinion.

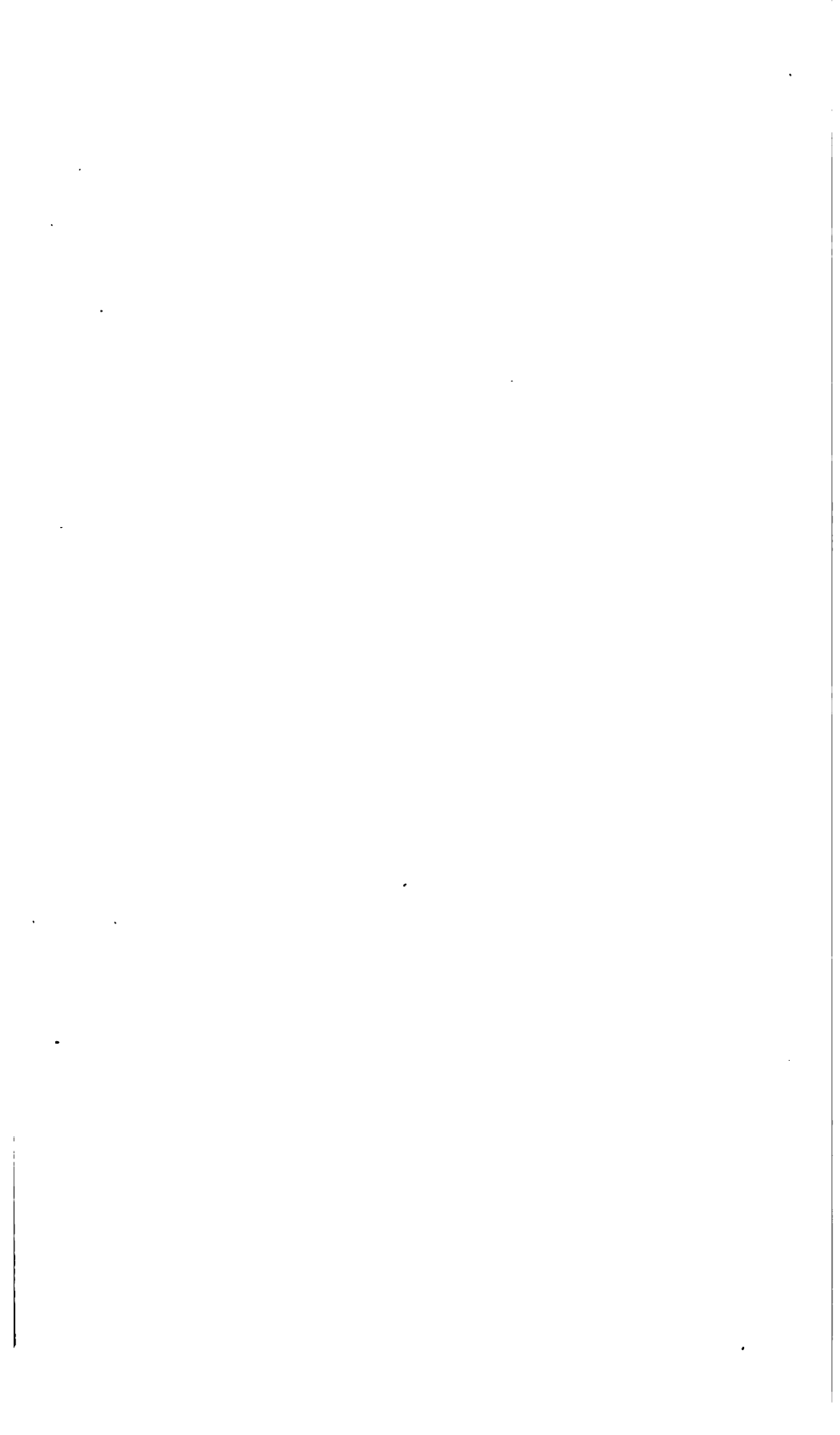
Rule discharged.

PROMOTIONS.

IN *Easter* Term *William Walton*, Esq., Attorney-General of the Duchy of Lancaster, took his seat within the bar on his appointment as King's Counsel.

DURING this Term *W. Fuller Boteler*, Esq., and *J. A. F. Simpkinson*, Esq., were appointed King's Counsel, and took their seats within the bar accordingly.

END OF TRINITY TERM.



AN

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2. *A.* remitted to *B.* a bank-bill, indorsed, "Pay to the order of *B.*, under provision for my note in favour of *C.*, payable at the house of *B.*, on 1st January, 1830." *B.* received the proceeds of the bill, and refused to pay them over to *C.* In an action for money had and received by *C.*:—

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1. By ruling the Sheriff to bring in the body before the time for justifying bail has expired, the plaintiff does not enlarge the time for justifying bail until the expiration of the body rule, if, at the period when, independently of the body rule, the time for justification expires, he take an assignment of the bail bond; for, by so doing, he waives the body rule. *Bolland, B., dissentiente. Ladd v. Arnaboldi*, 97
But see *R. M. T.* 281

2. If the defendant do not justify his bail in due time, and *comperuit ad diem* is pleaded to a declaration on the bail bond, the Court will order the appearance of the defendant to be recorded as of the day on which the bail justified. *Ladd v. Arnaboldi*, 97

3. Where persons, who are shewn to be bail in other actions, justify as bail by affidavit, they must swear that they are worth the sum required beyond what will satisfy their debts and their other engagements. *Henshaw v. Woolwich*, 150

4. After one successful opposition of bail, 5*l.* must be deposited with the Master, to cover the costs, before the bail can justify. *Smith v. Cooper*, 460

5. Bail who live within ten miles of the city of London or Westminster, must justify in person, and not by affidavit. *Anonymous*, 516

BAIL BOND.

See BAIL, 2.

BANKRUPTCY.

BAILIFF.

See COVENANT, iii.

BANKRUPTCY.

See AUCTION DUTY.

I. Petitioning Creditor's Debt.

1. Where a petitioning creditor's debt is proved by the depositions under the provisions of the 6 *Geo. 4*, c. 16, s. 92, it is not competent for the defendant to prove that such petitioning creditor's debt was a fraudulent contrivance between the bankrupt and the petitioning creditor. *Young v. Timmins*, 148

2. Where, in an action by the assignee of a bankrupt, it appeared that a bill drawn and indorsed by the petitioning creditor, and accepted by the bankrupt, had been produced at the opening of the commission, and had been then examined by the commissioners, and had afterwards been lost, and, though search had been made, could not be found or produced at the trial:—*Held*, that the petitioning creditor's debt was proved by evidence of the contents of such bill. *Pooley v. Millard*, 411

II. Property in Assignees.

1. The agent of a bankrupt who has made himself responsible for the price of goods, may stop them *in transitu*. But if, after they have reached a certain place, he give them a new destination in furtherance of the bankrupt's business, and in the course of the bankrupt's trade, when they arrive at the place of such destination, they vest in the bankrupt, and pass to his assignees. *Hawkes v. Dunn*, 519

2. A defendant received from *A.* some bacon, really the property of a bankrupt, and the messenger under the commission asked him if he had not got some bacon of the bankrupt; to which he replied, that he had some

belonging to *A.*; upon which the messenger desired him to take care of it, and not part with it, as more would be heard of it. Afterwards the defendant allowed the bacon to be returned by *A.* to the person from whom *A.* had received it:—*Held*, that this was evidence of a conversion. *Ibid.*

BILLS AND NOTES.

See ACTION, 2, 3.

TRADE.

1. Where, in an action by an indorsee against an acceptor of a bill of exchange, it appeared that the bill was drawn on a Sunday:—*Held*, that the bill was not void under the stat. 29 Car. 2, c. 7. *Begbie v. Levi*, 180

2. A widow gave a promissory note "for value received by my late husband:—"*Held*, first, that the note was valid on the face of it; and secondly, that the defendant was not at liberty to shew as a defence, that it was given as an indemnity against liabilities incurred on behalf of her late husband, and that the payee had not been damnified. *Ridout v. Bristow*, 231

3. Where a partnership firm is pledged by the acceptance of a bill of exchange by one partner in the name of the firm, the partnership, of whomsoever it may consist, whether they are named or not, and whether the partners are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached. *Wintle v. Cronther*, 316

4. Where a bill, accepted in a partnership firm, is applied, with the knowledge of the party who takes the bill, in part only to the separate use of the partner who actually accepts it, a secret partner, not known to the party who takes the bill, is liable in respect of so much of the amount as is not, to

the knowledge of the taker, applied to the separate use of the partner who accepts the bill. *Ibid.*

5. A letter to the indorser of a bill of exchange from the attornies of the holder, stating, that "a bill for 683*l.*, drawn by *A.* upon *B.*, and bearing your indorsement, has been put into our hands by *C.*, with directions to take legal measures for the recovery thereof, unless immediately paid," is not a sufficient notice of dishonour in an action by *C.*, the holder, against the indorser. *Solarte v. Palmer*, 417

BILL OF SIGHT.

Where goods are landed fraudulently under a bill of sight, it is no protection against penalties. *Attorney-General v. Hawkes*, 121

BODY RULE.

See BILL, 1.

REGULE GENERALES, iii.

BOND.

A. and *B.* and *C.*, his sureties, executed a mortgage bond, which recited that *A.* was seised in tail of certain premises, and was conditioned, that a recovery should be suffered, so as and in such manner as that under and by virtue thereof, and of a release to make a tenant to the *præcipe*, (also recited), a fee should be vested in *D.*:—*Held*, that the legal effect of the bond was, that *D.* should have a fee, and that *A.*, being seised for life only, the bond was forfeited. *Edwards v. Brown*, 307

BYE-LAW.

A bye-law of a corporation founded on a custom to exclude foreigners, and authorizing a distress for a penalty in case of a breach of the bye-law, *without a previous demand and*

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refusal of such penalty, is bad. Davies v. Morgan, 587

CALVES.

The tenth calf in the order of birth is the tithe calf, where the order of birth can be ascertained. *Tratman v. Carrington,* 320

CASE.

In 1803, the plaintiff's house was built against the pine end wall of the defendant's house, by permission. In 1829, the defendant made an excavation in a careless and unskilful manner, in his own land, near to his pine end wall, by which he weakened his pine end wall, and, consequentially, injured the house of the plaintiff:—*Held*, that an action on the case was maintainable for this injury. *Brown v. Windsor,* 20

CHARTER-PARTY.

By a charter-party, which was found to be executed *bonâ fide*, the owners of a ship appointed *A.* to the command of the ship, on a voyage from *London* to *Calcutta*, and back. *A.* was to load the ship out and home, and on intermediate voyages at his option during a limited period, and was to pay to the owners a monthly freight, payable as specified, and the balance of such monthly freight was to be secured to the owners by the freight bills, for the freight of the homeward cargo from *Calcutta*, being made payable to joint trustees for the owners and *A.*; who were, out of the proceeds of such freight bills, to pay the balance of the monthly freight to the owners, and then to pay the surplus to *A.* An agent of the owners was to go on board to superintend the management of the stores, with power to displace *A.* and to appoint another

COMMISSION.

commander in case of his breaking the agreement on his part. *C. & Co. of Calcutta*, having knowledge of this instrument, shipped goods by the vessel at *Calcutta* for *London*, and drew freight bills for the amount of the freight in favour of the trustees. The goods so shipped were never delivered:—*Held*, that the absolute owners were not liable to the shippers for the non-delivery. *Newberry v. Colvin,* 192

CLERK IN COURT.

See REGULE GENERALES, xii.

A clerk in court in the *Exchequer*, suing, with a person not entitled to *Exchequer* privilege, by *capias* of privilege, an attorney of the *King's Bench*, does not lose his privilege. *Elkins v. Harding,* 345

COLLOQUIUM.

See SLANDER.

COMMISSION.

Under the 4th section of the statute 1 *Will. 4*, c. 22, the power of the Courts at *Westminster* to issue commissions for the examination of witnesses abroad, is not confined to cases where the witnesses reside within the *King's dominions*. *Duckett v. Williams,* 510

COMPARISON OF HAND-WRITING.

The rule that comparison of handwriting is not evidence, does not extend so far as to prevent the Court or Jury from instituting a comparison between two documents, of which *primâ facie* evidence has been given. *Griffith v. Williams,* 47

CORPORATION.

COMPERUIT AD DIEM.

If the defendant do not justify his bail in due time, and *comperuit ad diem* is pleaded to a declaration on the bail bond, the Court will order the appearance of the defendant to be recorded as of the day on which the bail justified. *Ladd v. Arnaboldi*, 97

COMPETENCY OF WITNESSES.

See EVIDENCE, 5, 15, 17, 18.

CONCILIIUM.

See REGULE GENERALES, vi.

CONSIDERATION.

See BILLS & NOTES, 2.
PLEADING, iii.

CONSTRUCTION.

See BOND.
COVENANT, iii.

CONVERSION.

A defendant received from *A.* some bacon, really the property of a bankrupt, and the messenger under the commission asked him if he had not got some bacon of the bankrupt; to which he replied that he had some belonging to *A.*; upon which the messenger desired him to take care of it, and not part with it, as more would be heard of it. Afterwards, the defendant allowed the bacon to be returned by *A.* to the person from whom *A.* had received it:—*Held*, that this was evidence of a conversion. *Hawkes v. Dunn*, 519

CORPORATION.

See BYE-LAW.
TOLLS.

COSTS.

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CORPORATOR.

1. Corporators are not competent witnesses in support of a custom to exclude foreigners. *Davies v. Morgan*, 587
2. Declarations of deceased corporators are evidence in support of a custom to exclude foreigners—*Semble*, *Ibid.*

COSTS.

I. Of the Day.

Costs of the day for not proceeding to trial may be moved for after a rule for judgment as in case of a nonsuit has been discharged upon a peremptory undertaking. *Hockin v. Reid*, 466

II. Of New Trials.

1. By the practice of this Court, where a new trial is granted, the party who succeeds upon both trials is entitled to the costs of both trials, if the rule for the new trial is silent upon the subject of costs. *Loader v. Thomas*, 54
2. In an action upon a statute which gives double costs, if a new trial be granted, nothing being said upon the subject of costs, the party who succeeds upon both trials is entitled to double costs of both trials. *Ibid.*
3. Where the plaintiff has a verdict with liberty to move to increase the amount, and obtains a rule for that purpose which is discharged, neither party is entitled to costs unless there be a special order of the Court. *Chapple v. Durston*, 11

III. Of Venire de Novo.

Where a *venire de novo* is awarded, the Court has no power over the costs of the application. *Edwards v. Brown*, 354

606 COURT OF REQUESTS.

IV. Of Ejectment.

The costs of an ejectment may be recovered in an action for mesne profits, though the defendant has appeared and pleaded in the ejectment, and no costs have been taxed. *Symonds v. Page*, 29

V. In Extents.

Upon a *scire facias* upon a recognizance entered into to abide an award respecting matters in difference upon an extent in aid:—*Held*, that the defendant, having succeeded upon demurrer, was not entitled to costs. *Rex v. Bingham*, 379

VI. Under Court of Requests Acts.

Where a clerk in court, and an attorney of the *King's Bench*, sued an attorney of the *King's Bench* by *capias* of privilege, and recovered less than 5*l.*:—*Held*, that it was not a case within the *London Court of Requests act*, 39 & 40 *Geo.* 3, c. 104. *Elkins v. Harding*, 345
And see Burn v. Pasmore, 346, n.

VII. Taxation of.

See *REGULÆ GENERALES*, iv.

VIII. How recovered.

See *ATTORNEY*, iii.

The Court of Great Sessions ordered an infant, suing by *prochein amy*, to pay costs; and this Court granted an attachment against the *prochein amy* for disobeying that order. *Evans v. Davis*, 460

COURT OF REQUESTS.

See *COSTS*, vi.

COVENANT.

COVENANT.

I. Implied.

1. A lease of an undivided third part of certain mines, reciting, that, by permission of the lessor and the owners of the other two thirds, the lessee had pulled down an old smelting mill, and had agreed to build another of larger dimensions, contained a covenant by the lessee to keep such new mill in repair, and so leave it at the expiration of the term, but contained no covenant by the lessee to build the new mill:—*Held*, that such a covenant by the lessee might be implied, and that the lessor might sue upon the implied covenant in respect of his interest. *Easterby v. Sampson*, 105

2. Covenant against *A.* and *B.* on a covenant supposed to be implied as incident to a demise by lease. On production of the lease, it appeared, that, in point of law, *A.* only demised, and that *B.*, who had an equitable interest merely, confirmed:—*Held*, that the action was not maintainable against *A.* and *B.* *Smith v. Pocklington*, 445

II. Running with the Land.

A., by lease, containing a recital from which a covenant by the lessee to build a smelting mill was to be implied, demised all mines and minerals then open or discovered, or which might, during the term, be opened or discovered at or under certain moors and waste lands, and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for mines, *habendum* the demised premises with the appurtenances for nineteen years. *A.* assigned his reversion of and in the demised premises with the appurtenances to *B.*, who devised the same to *C.*:—*Held*, that the implied cove-

DEATH.

nant to build a smelting mill ran with the land, because it tended to the use, benefit, and advantage of the thing demised, and that the assignee of the reversion might therefore sue upon it. *Easterby v. Sampson*, 105

III. Construction of.

Where a Sheriff's bailiff, in the deed appointing him bailiff, covenanted (*inter alia*) to pay the Sheriff the costs and charges of defending any action, or of prosecuting or opposing any motion, &c., touching or concerning any matter wherein the bailiff should act, or assume to act as bailiff, to the said Sheriff; and afterwards, in the same deed, covenanted to indemnify, &c., the Sheriff, against all actions, costs, &c., &c., which might be commenced, &c., or which he might suffer, pay, or be liable to, for or by reason of the executing, not executing, returning, or not returning, or mis-return of any writ, process, mandate, precept, or warrant, occasioned by the act or default of the said bailiff:—*Held*, that the covenant was not confined to the wrongful act of the bailiff, but, that it extended to protect the Sheriff from the costs, &c., which he had incurred, from an action, &c., having been prosecuted against him, in consequence of a return made by him to a writ, on instructions for the return given by the bailiff, though those instructions were correct and proper. *Farebrother v. Worsley*, 549

CUSTOMS AND EXCISE.

See BILL OF SIGHT.

EVIDENCE, 6, 7.

GLASS.

MASTER & SERVANT.

PLEADING, viii.

DEATH.

See NEW TRIAL, iii.

DEPARTURE.

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DEBTOR AND CREDITOR.

See ACTION, 2.

DECLARATION.

I. Form of.

See REGULE GENERALES, xiv.

II. De bene esse.

See REGULE GENERALES, v.

DEED.

See COVENANT, iii.

DEMISE.

See COVENANT, i. ii.

DEMURRER.

See AMENDMENT, ii.

REGULE GENERALES, vi.

1. Where a defendant demurs for delay, and there is not a sufficient number of days in the Term to enable the plaintiff to conform to the usual practice in cases of demurrer, the Court will allow a *concilium* moved for on the last day but two of the Term, to be drawn up for the last day of Term, although no rule be given to bring in the paper books, and no paper books be in fact delivered. *Cooper v. Hawkes*, 219

2. Before the plaintiff can move for judgment upon demurrer, the demurrer books must be delivered to all the Barons, and if the defendant do not deliver his books, the plaintiff must deliver them on his behalf. *Commelin v. Thompson*, 461

DEPARTURE.

See PLEADING, v.

DESCENT.

See FINE.

DETINUE.

See PLEADING, v.

DEVIATION.

See POLICY.

DISHONOR.

See BILLS & NOTES 5.

DISTRESS.

Materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home, are privileged from distress for rent due from the weaver to his landlord; but a frame or other machinery, delivered by the manufacturer to the weaver, together with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, is not privileged, unless there be other goods upon the premises sufficient to satisfy the rent due. *Wood v. Clarke*, 484

DISTRINGAS.

I. At Common Law.

1. The service of a *venire* at the counting-house of defendants, who have no residence in this country, is not a sufficient service to warrant the issuing of a *distringas* according to the old course of the Court.

Semble, That the old mode of proceeding by *venire* and *distringas* is taken away by the stat. 7 & 8 Geo. 4, c. 71, s. 5. *Hall v. Gumples*, 539

2. The Court will not increase issues upon a *distringas* issued upon the Sheriff's return of *summoneri feci*

to the *venire*, according to the old course of the Court—*Semble*. *Pennell v. Kingston*, 548

II. By Statute.

1. Requisites of the affidavit for a *distringas* upon a *venire*. *Pitt v. Eldred*, 147

2. The affidavit for a *distringas* upon a *venire* must be full and distinct, and must disclose circumstances from which the Court may see that the defendant keeps out of the way to avoid personal service. *Winstanley v. Edge*, 381

3. The Court will not grant a *distringas*, upon an affidavit of the belief of the deponent that the defendant keeps out of the way to avoid personal service; but it must also be made to *appear*, to the satisfaction of the Court, that the defendant keeps out of the way to avoid service; and the grounds for the belief must be stated. *Godkin v. Redgate*, 401

4. Affidavit for *distringas*. *White-horne v. Simone*, 402

III. When issued.

1. *Quære*, whether a *distringas* under the statute may issue immediately upon the return of the *venire*.

Semble, that the time within which a *distringas* may issue after the return of the *venire*, is in the discretion of the Court. *Thomas v. Elder*, 517

2. Time of issuing a *distringas*. *Field v. Radden*, 518

DOMICILE.

See LEGACY DUTY.

DOUBLE COSTS.

See COSTS, ii. 2.

EJECTMENT.

DUTIES OF OFFICERS OF COURT.

See REGULÆ GENERALES, xii.

EJECTMENT.

I. Declaration in.

A notice at the foot of a declaration in ejectment, served before term, which omits to state the term in which the tenant is to appear, is sufficient. *Doe v. Roe*, 330

II. Service of Declaration.

See REGULÆ GENERALES, vii.

Where a declaration in ejectment was served on the essoign day by mistake, the Court directed the rule for judgment to be served on the tenants in possession, and granted the rule for judgment against the casual ejector absolute, unless cause was shewn in five days after such service. *Doe d. Brent v. Roe*, 483

III. Evidence in.

Upon the trial of an ejectment, the landlord (defendant) proposed to call the tenants in possession of different parts of the property, upon whom ejectments had been served, to prove an adverse possession; but they were held to be incompetent: and the Court refused to enter into the question, whether they were competent to prove the possession of each other, because the distinction had not been pointed out at the trial, but intimated an opinion that they were not competent for any purpose. *Doe d. Lewis v. Preece*, 515

IV. Costs.

The costs of an ejectment may be recovered in an action for mesne profits, though the defendant has appeared and pleaded in the ejectment, and

EVIDENCE.

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no costs have been taxed. *Symonds v. Page*, 29

ESSOIGN DAY.

Where the *first* day in full term falls on a *Sunday*, the essoign is to be calculated from that day. *Doe d. Brent v. Roe*, 483

EVIDENCE.

1. The statute of limitations must be replied specially to a plea of set-off, and cannot be taken advantage of under the general replication of *nil debet*. *Chapple v. Durston*, 1

2. Declaration alleged, that the plaintiff was possessed of a messuage, &c., belonging to and supporting which there were certain foundations, which the plaintiff had enjoyed, &c., and ought, &c., to enjoy. On evidence, it appeared, that the plaintiff was only entitled to an easement in the foundations which belonged to the defendant:—*Held*, no variance. *Brown v. Windsor*, 20

3. The rule, that comparison of handwriting is not evidence, does not extend so far as to prevent the Court or Jury from instituting a comparison between two documents, of which *prima facie* evidence has been given. *Griffith v. Williams*, 47

4. In an action of trespass *quare clausum fregit*, the defendant pleaded that A. C. was seised in fee, and, being so seised, granted a right of way by non-existing grant. The plaintiff replied, traversing the grant:—*Held*, that, on these pleadings, it was not competent for the plaintiff to give evidence to shew that A. C. was not seised in fee, for the purpose of rebutting the presumption of the grant. *Comlishaw v. Cheslyn*, 48

5. A. by agreement promised to surrender into the hands of the lord, &c., "all those brick-works, copy-

hold of inheritance, then in the possession of *A.*, with full liberty, &c." to the use of *B.* and *C.*: no surrender was made, but *B.* and *C.* entered upon the premises. *B.* afterwards surrendered his interest to *C.*, and an action of trespass having been brought against *C.* and *D.*, they pleaded leave and licence from *A.* to *B.* and *C.*; *C.* justifying in his own right, and *D.* as the servant of *B.* and *C.*, and by their command; to which *A.* replied *de injuria*, &c. The question being, whether the *locus in quo* was comprised in the agreement, *B.* was called by the defendants to prove, by parol declarations of the plaintiff, that the *locus in quo* was so comprised. *B.*'s evidence was objected to, *first*, because he was bound to indemnify *D.* his servant, for an act done by his command in the assertion of a supposed right; and *secondly*, because it was not competent to the defendants to extend by parol evidence the terms of the agreement to premises not in the possession of *A.* at the time:—*Held*, *first*, that *B.* was a competent witness; and *secondly*, that the terms of the agreement being ambiguous might be explained by parol testimony. *Paddock v. Fradley*, 90

6. Information for offering a bribe to *Thomas Dabbs*, a custom-house officer. Evidence that his name of baptism was *Thomas Tyrrel Dabbs*, in which name his commission was made out, but that he was as well, or better, known at the custom-house, and in the trade, by the name of *Thomas Dabbs*, which name he himself generally used:—*Held*, no variance. *Attorney-General v. Hawkes*, 121

7. Where an information charged an importation of bugles, and it was doubtful whether the articles imported were beads or bugles, upon which different duties were payable, but they were treated at the custom-house and

in the trade as bugles, and the defendant himself had treated them as such:—*Held*, no variance. *Ibid.*

8. Where a petitioning creditor's debt is proved by the depositions under the provisions of the 6 *Geo.* 4, c. 16, s. 92, it is not competent for the defendant to prove that such petitioning creditor's debt was a fraudulent contrivance between the bankrupt and the petitioning creditor. *Young v. Timmins*, 148

9. An instrument in the following terms, "nine years after the date hereof, I promise to pay to &c., the sum of &c., with lawful interest, provided *D. M.* shall not return to *England*, or his death be duly certified in the meantime," is no evidence of money lent, either on a special or *indebitatus* count. *Morgan v. Jones*, 162

10. Where, upon an issue upon a district modus, the plaintiff clearly proved the existence for 150 years of the payment pleaded, and the defendant produced Pope *Nicholas'* taxation, and other documentary evidence, which ascribed to the rectory, and to the property in respect of which the modus was pleaded, values inconsistent with the alleged modus:—*Held*, after verdict for the plaintiff, that it was for the jury to say to what weight the documentary evidence was entitled, and that they might take into their consideration whether the documentary evidence ascribed to the rectory and the district their real value at the time. *Beck v. Bree*, 246

11. Where a party who executes a bond is at the time competent to execute it, he cannot, under the plea of *non est factum*, shew that he was misled as to the legal effect of the bond. *Edwards v. Brown*, 307

12. A declaration stated, that, in consideration that the plaintiff would demise to the defendant furnished lodgings for a certain term, to wit, two years, the defendant promised;

&c., and alleged, by way of performance, that the defendant did demise, &c., for the *said* term of two years: the evidence was, that the defendant agreed to take the lodgings for *two or three years*:—*Held*, that the consideration for the promise was not truly stated, and that the allegation of performance rendered the term stated material, notwithstanding it was laid under a *videlicet* in setting forth the consideration. *Aliter* on a count on a consideration *executed*. *Edge v. Stafford*, 391

13. Where, in an action by the assignee of a bankrupt, it appeared that a bill drawn and indorsed by the petitioning creditor, and accepted by the bankrupt, had been produced at the opening of the commission, and had been then examined by the commissioners, and had afterwards been lost, and, though search had been made, could not be found or produced at the trial:—*Held*, that the petitioning creditor's debt was proved by evidence of the contents of such bill. *Pooley v. Millard*, 411

14. A Sheriff's officer sent a written memorandum to the Sheriff's office, stating that he had arrested *A. B.* at a certain place, this return was filed at the Sheriff's office, and the officer being dead, was received in evidence to prove the place of such arrest in an action between *A. B.* and a third party: the Court granted a new trial, intimating a strong opinion that such return was not evidence of the place of arrest, but giving the party an opportunity of putting the question upon the record.

Semble, that such return was not receivable in evidence for any purpose. *Chambers v. Bernasconi*, 451

15. Upon the trial of an ejectment, the landlord (defendant) proposed to call the tenants in possession of different parts of the property, upon whom ejectments had been served, to

prove an adverse possession; but they were held to be incompetent; and the Court refused to enter into the question, whether they were competent to prove the possession of each other, because the distinction had not been pointed out at the trial; but intimated an opinion that they were not competent for any purpose. *Doe d. Lewis v. Preece*, 515

16. A defendant received from *A.* some bacon, really the property of a bankrupt, and the messenger under the commission asked him if he had not got some bacon of the bankrupt; to which he replied that he had some belonging to *A.*; upon which the messenger desired him to take care of it, and not part with it, as more would be heard of it. Afterwards, the defendant allowed the bacon to be returned by *A.* to the person from whom *A.* had received it:—*Held*, that this was evidence of a conversion. *Hawkes v. Dunn*, 519

17. Corporators are not competent witnesses in support of a custom to exclude foreigners. *Davies v. Morgan*, 587

18. Declarations of deceased corporators are evidence in support of a custom to exclude foreigners—*Semble*. *Ibid.*

19. The recitals of a warrant of distress, put in evidence by the plaintiff to connect the defendant with a trespass, are not evidence for the defendant of the facts recited. *Ibid.*

20. The circumstances which are necessary to make a document evidence, must be proved *aliunde*, and cannot be gathered from the document itself. *Ibid.*

EXAMINATION OF WITNESSES.

See COMMISSION.

EXCISE AND CUSTOMS.

See CUSTOMS & EXCISE.

EXECUTION.

N., in a marriage settlement, reciting that *I.*, his intended wife, was possessed of certain goods, and that it had been agreed, that in case she survived him she should have the goods and such articles as might be bought in lieu thereof, for her own use, and in case she should die before him, that she might dispose of the goods, covenanted with trustees that he would not dispose of the goods without the consent of *I.*, that he would purchase new articles in lieu of those which might be worn out or disposed of, that if she survived him she should have the goods for her own use, and if he survived her she should dispose of them subject to his life-interest. No assignment of the goods was made to the trustees. *N.* and *I.* separated after their marriage, and *I.* demised the goods to *F.*, as a yearly tenant:—*Held, first*, that the goods were, notwithstanding the settlement, the property of *N.*, and might be seized under a *fi. fa.* against him; but, *secondly*, that they could not be seized for his debt during the continuance of the demise to *F.* *Izod v. Lamb*, 35

EXECUTORS AND ADMINISTRATORS.

See LEGACY DUTY.
PROBATE DUTY.

A. agrees to do certain work, and dies before the work is begun: the executors of *A.* do the work, using the materials of *A.*:—*Held*, in an action by the executors, in their representative character, for work and labour done, and materials found, that the executors might recover the value

FIERI FACIAS.

of the materials; and *semble*, that they might also recover for the work and labour as executors of *A.* *Marshall v. Broadhurst*, 403

EXTENT.

I. In Chief.

An agent of a fire insurance company, who has received premiums and duties for the office to whom he has given security, is liable to a writ of immediate extent for the duties. *Rex v. Wrangham*, 408

II. In Aid.

Upon a *scire facias* upon a recognizance entered into to abide an award respecting matters in difference upon an extent in aid:—*Held*, that the defendant having succeeded upon demurrer, was not entitled to costs. *Rex v. Bingham*, 379

III. Proceedings under.

1. A Sheriff cannot retain against the Crown a sum of money deposited by an agent of the Crown, to cover the expenses of a sale by auction of property seized under an extent, and sold under a *venditioni exponas*. *The King v. Jones*, 140

2. A sale under an extent is not vitiated as against a purchaser by the agent of the Crown making a *bond fide* bid for himself. *Rex v. Marsh*, 406

FACTOR.

See PRINCIPAL AND AGENT.

FEES OF COURT.

See REGULE GENERALES, viii.

FIERI FACIAS.

See EXECUTION.

GRANT.

FINE.

A., tenant for life, remainder to *B.*, his wife, for life, remainder to the heirs of the body of *B.* by *A.* to be begotten: *C.*, the issue of *A.* and *B.*, in their lifetime, levies a fine *come ceo*, &c., without proclamations, but containing a clause of warranty: *C.* survives *A.* and *B.*, and dies, leaving issue *D.*:—*Held*, that the right of entry of *D.* was taken away by the effect of the warranty. *Doe v. Thomas v. Jones*, 528

FREIGHT.

See CHARTER-PARTY.

FRAUD.

See EVIDENCE, 11.

FURNISHED LODGINGS.

See LANDLORD & TENANT, 1.
STATUTE OF FRAUDS, 1, 2.

GLASS.

Where a maker of glass, before the termination of a journey, unladed, under notice, the materials remaining in a pot, part of which he had worked out, and put those materials with others into an overtaker, which was gauged, and the duties charged and paid thereon:—*Held*, that he was entitled to a deduction from the duties payable upon the gauge of the entire journey, in respect of the materials so laded out, having paid the duty in respect of those materials on the gauge of the overtaker. *Attorney-General v. Bell*, 237

GRANT.

See EVIDENCE, 4.

1. A grant of a fair or market, with an express grant of toll, passes rea-

HEIR AND ANCESTOR. 613

sonable toll, though no amount of toll be specified. The Corporation of *Stamford v. Pawlett*, 57

2. The grant of a fair or market "*cum omnibus tolneis, et aliis proficuis predictis feriis sive nudinis pertinentibus et spectantibus*," passes a reasonable toll to the grantee, though the amount of toll be not specified. *Pawlett v. The Corporation of Stamford*, (in error), 400

GUARANTIE.

A guarantie in the following form—" *R. R.*, plaintiff, and *J. A.*, defendant: We, the undersigned, jointly and severally undertake and agree to pay *G. C. C.*, gent., the debt and full costs in this action, provided on or before the 1st day of *Jan.* 1831, a sum of 11*l.* 10*s.* 3*d.* be not paid to him the said *G. C. C.* at his office, as the attorney for the plaintiffs; dated this 6th day of *Nov.* 1830," and containing in the margin the following letters and figures:—"Debt 6*l.* 11*s.* 11*d.*, costs 4*l.* 18*s.* 4*d.*; 11*l.* 10*s.* 3*d.*," does not shew a sufficient consideration to take it out of the 4th section of the statute of frauds; and consequently no action can be maintained thereon. *Cole v. Dyer*, 461

HABEAS CORPUS.

Where a defendant is in custody in the county of *A.*, upon an attachment issuing out of this Court, he may be removed to the county of *B.* to take his trial upon an indictment found in the latter county. *Re Wetton*, 459

HANDWRITING.

See COMPARISON OF HANDWRITING.

HEIR AND ANCESTOR.

To debt against heirs on the bond
T T 2

of their ancestor, the defendants pleaded *non est factum, per fraudem*, and *riens per descent*; and the plaintiff replied, that, after the death, &c., and before the commencement of the suit, the defendants had lands, &c., by descent, &c.:—*Held*, that this was a replication under the stat. 3 & 4 *W. & M.* c. 14, s. 6, and that the Jury, having found that lands descended, ought to have assessed the value of those lands. *Quære*, whether the statute 3 & 4 *W. & M.* c. 14, applies to all lands by descent, or to such only as are aliened before action brought. *Brown v. Shuker*, 583

HUSBAND AND WIFE.

See MARRIAGE SETTLEMENT.

IMPARLANCE.

See REGULE GENERALES, ix.

INFORMATION.

See APPEARANCE, 2.
PRACTICE, xviii. 1.

INDEMNITY BOND.

See COVENANT, iii.

INNUENDO.

See SLANDER.

INSURANCE.

See ANNUITY.
POLICY OF INSURANCE.

JOINDER OF DEFENDANTS IN ONE WRIT.

See REGULE GENERALES, xvi.

LEGACY DUTY.

JUDGMENT AS IN CASE OF A NONSUIT.

1. In a country cause, where issue is joined in *Michaelmas* Term, and the plaintiff does not proceed to trial at the Assizes after *Hilary* Term, the defendant may, in *Easter* Term, move for judgment as in case of a nonsuit. *Crowley v. Dean*, 18

See *Spiers v. Parker*, *Ibid.* n.

2. Where issue is joined in an issuable term in a country cause, and no notice of trial is given for the ensuing assizes, the defendant cannot move for judgment as in case of a nonsuit, until the term next after the second assizes. *Simons v. Folkenham*, 513

JUSTICE.

See MAGISTRATE.

LANDLORD AND TENANT.

See COVENANT, i. ii.

DISTRESS.

1. A tenant who agrees to take furnished lodgings, but does not enter, is not liable in an action for use and occupation. *Edge v. Strafford*, 391

2. Covenant against *A.* and *B.* on a covenant supposed to be implied as incident to a demise by lease. On production of the lease, it appeared, that, in point of law, *A.* only demised, and that *B.*, who had an equitable interest merely, confirmed:—*Held*, that the action was not maintainable against *A.* and *B.* *Smith v. Pocklington*, 445

LEASE.

See COVENANT, i. ii.
STATUTE OF FRAUDS, 1, 2.

LEGACY DUTY.

1. *American, Austrian, French, and Russian* stock, the property of a tes-

MARRIAGE SETTLEMENT.

tator domiciled in this country, is liable to legacy duty. *In re Erwin*, 151

2. The rule for an attachment, for not accounting to the legacy office, is a rule nisi, which makes itself absolute by a certain day, unless in the meantime cause be shewn. *In the Matter of the Estate of Vivian*, 409

MACHINERY.

See DISTRESS.

MAGISTRATE.

1. A notice of action against a magistrate, under 24 Geo. 2, c. 44, is sufficient to warrant a writ, and proceedings against the magistrate and a constable jointly. *Jones v. Simpson*, 174

2. Where notice was given to the magistrate, as above, and the plaintiff, after the expiration of a month, sued out a writ against the magistrate alone, and afterwards abandoned that writ, and sued out another against the magistrate and constable jointly:—*Held*, that the notice was sufficient to warrant the second writ, and proceedings thereupon. *Ibid.*

MARINER.

See MASTER & SEAMAN.

MARRIAGE SETTLEMENT.

N., in a marriage settlement, reciting that *I.*, his intended wife, was possessed of certain goods, and that it had been agreed, that in case she survived him she should have the goods and such articles as might be bought in lieu thereof, for her own use, and in case she should die before him, that she might dispose of the goods, covenanted with trustees that he would not dispose of the goods without the con-

MASTER AND SERVANT. 615

sent of *I.*, that he would purchase new articles in lieu of those which might be worn out or disposed of, that if she survived him she should have the goods for her own use, and if he survived her she should dispose of them, subject to his life-interest. No assignment of the goods was made to the trustees. *N.* and *I.* separated after their marriage, and *I.* demised the goods to *F.*, as a yearly tenant:—*Held*, first, that the goods were, notwithstanding the settlement, the property of *N.*, and might be seized under a *fi. fa.* against him; but, secondly, that they could not be seized for his debt during the continuance of the demise to *F.* *Izod v. Lamb*. 35

MASTER AND SEAMAN.

Where *C.*, a mariner on board an *East Indiaman*, at anchor in the bay of Canton, within two miles of Macao, and within hail of several other vessels, having been guilty of disorderly conduct in the absence of the captain, was, upon the captain's return to the ship, four days afterwards, ordered to be flogged, upon which *L.*, a mariner on board the same ship, resisted the execution of the captain's orders, and was guilty of riotous and mutinous conduct, for which by command of the captain he was flogged:—*Held*, that the captain was justified in flogging *L.*, and that the authority of the captain of a vessel to inflict moderate punishment is not confined to a case where the vessel is at sea beyond the reach of assistance; and that such punishment need not be inflicted immediately upon the act being done for which the punishment is inflicted. *Lamb v. Burnett*, 291

MASTER AND SERVANT.

Where a trader harbours and con-

ceals smuggled goods, he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect the smuggled goods, though the master be absent at the time, and the act be done by the servant upon the exigency of the occasion, when the goods are discovered. *Attorney-General v. Sidon*, 220

MEMORANDA.

See PROMOTIONS.

REGULÉ GENERALES.

MESNE PROFITS.

See COSTS, iv.

MISNOMER.

See VARIANCE.

MONEY.

I. *Lent*.

See ACTION, 3.

REGULÉ GENERALES, xiv.

II. *Had and received*.

See ACTION, 2.

REGULÉ GENERALES, xiv.

NEW TRIAL.

I. *When to be moved*.

Where a cause is tried at the sittings in Term, a motion may be made for a new trial, at any time within four days after the return of the *distringas*, although more than four days have elapsed since the trial. *Mason v. Clarke*, 411

II. *When granted*.

Upon an application by a defend-

NOTICE.

ant for a new trial, the Court will refuse it if there be an essential defect in the defendant's evidence, although no objection was made by the plaintiff at the trial upon that point. *Davies v. Morgan*, 587

III. *After Death of Party*.

Where the plaintiff has died after verdict, the Court may grant a new trial on the application of the defendant, and would, in such case, impose terms on him to prevent his taking advantage of the plaintiff's death. *Griffith v. Williams*, 47

IV. *Costs of*.

By the practice of this Court, where a new trial is granted, the party who succeeds upon both trials is entitled to the costs of both trials, if the rule for the new trial is silent upon the subject of costs. *Loader, qui tam, v. Thomas*, 54

NOTICE.

I. *Of Action*.

1. A notice of action against a magistrate, under 24 Geo. 2, c. 44, is sufficient to warrant a writ, and proceedings against the magistrate and a constable jointly. *Jones v. Simpson*, 174

2. Where notice was given to the magistrate, as above, and the plaintiff, after the expiration of a month, sued out a writ against the magistrate alone, and afterwards abandoned that writ, and sued out another against the magistrate and constable jointly:—*Held*, that the notice was sufficient to warrant the second writ, and proceedings thereupon. *Ibid*.

II. *Of Trial*.

See REGULÉ GENERALES, xx.

PARTNERS.

III. *Of Dishonour of Bill.*

See **BILLS & NOTES**, 5.

IV. *Service of.*

See **REGULÉ GENERALES**, xix.

NON EST FACTUM.

See **EVIDENCE**, 11.

NONSUIT.

See **JUDGMENT AS IN CASE OF A NON-SUIT**.

Where that which is laid as the cause of action in the declaration is proved at the trial, the plaintiff cannot be nonsuited, upon the ground that the facts charged do not disclose a cause of action. *Lumby v. Allday*, 301

OFFICE HOURS.

See **REGULÉ GENERALES**, xi.

OFFICERS OF COURT.

See **REGULÉ GENERALES**, xii.

OUTLAWRY.

Where, to a special *capias utlagatum*, the Sheriff returns an inquisition finding that the defendant has benefices but no lay fee, this Court will award a writ of sequestration upon reading the transcript of the outlawry and inquisition. *The King v. Hind*, 389

PARTNERS.

Liability of.

1. Where a partnership firm is pledged by the acceptance of a bill of exchange by one partner in the name of the firm, the partnership, of whomsoever it may consist, whether

PENALTIES.

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they are named or not, and whether the partners are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached. *Wintle v. Crowther*, 316

2. Where a bill, accepted in a partnership firm, is applied, with the knowledge of the party who takes the bill, in part only to the separate use of the partner who actually accepts it, a secret partner, not known to the party who takes the bill, is liable in respect of so much of the amount as is not to the knowledge of the taker applied to the separate use of the partner who accepts the bill. *Ibid.*

3. Where *A.*, *B.*, and *C.*, not being general partners, entered into a joint speculation, and each was to contribute a third:—*Held*, that *A.*, who had paid his share, was not liable to the bankers of *B.*, for monies advanced by such bankers on the individual credit of *B.*, without the knowledge of *A.*, though such monies were applied in payment of bills drawn upon *B.* in the course of the joint speculation. *Smith v. Craven*, 500

PENAL ACTION.

See **COSTS**, ii. 2.

PENALTIES.

See **BILL OF SIGHT**.

MASTER & SERVANT.

PETITIONING CREDITOR'S DEBT.

1. Where a petitioning creditor's debt is proved by the depositions under the provisions of the 6 *Geo.* 4, c. 16, s. 92, it is not competent for the defendant to prove that such petitioning creditor's debt was a fraudulent contrivance between the bankrupt and

the petitioning creditor. *Young v. Timmins*, 148

2. Where, in an action by the assignee of a bankrupt, it appeared that a bill drawn and indorsed by the petitioning creditor, and accepted by the bankrupt, had been produced at the opening of the commission, and had been then examined by the commissioners, and had afterwards been lost, and, though search had been made, could not be found or produced at the trial:—*Held*, that the petitioning creditor's debt was proved by evidence of the contents of such bill. *Pooley v. Millard*, 411

PLEADING.

I. In Abatement.

See PRACTICE, i.

II. Forms.

See REGULÆ GENERALES, xiv.

III. Assumpsit.

See ACTION, 3.

A declaration stated, that, in consideration that the plaintiff *would* demise to the defendant furnished lodgings for a certain term, to wit, two years, the defendant promised, &c., and alleged, by way of performance, that the defendant did demise, &c., for the *said* term of two years; the evidence was, that the defendant agreed to take the lodgings for *two or three years*:—*Held*, that the consideration for the promise was not truly stated, and that the allegation of performance rendered the term stated material, notwithstanding it was laid under a *videlicet* in setting forth the consideration. *Aliter* on a count on a consideration *executed*. *Edge v. Strafford*, 391

IV. Debt.

See HEIR & ANCESTOR.

A declaration in debt demanded 60*l.*, and contained six counts for 10*l.* each; and the defendant pleaded that he did not owe the said sum of 10*l.* above demanded. The plaintiff treated this plea as a nullity, and signed judgment. The Court set the judgment aside. *Risdale v. Kelly*, 410

V. Detinue.

To a count in detinue, on the bailment of a promissory note to be redelivered on request, the defendant pleaded, that the plaintiff had deposited the note with him, to be kept as a pledge and security for the repayment of a loan of 50*l.*; the plaintiff replied a tender of the 50*l.*:—*Held*, on special demurrer, that the replication was good, and no departure. *Gledstane v. Hewitt*, 565

VI. Case.

See SLANDER.

Declaration alleged, that the plaintiff was possessed of a messuage, &c., belonging to and supporting which there were certain foundations, which the plaintiff had enjoyed, &c., and ought, &c., to enjoy. On evidence, it appeared, that the plaintiff was only entitled to an easement in the foundations which belonged to the defendant:—*Held*, no variance. *Brown v. Windsor*, 20

VII. Trespass.

In an action of trespass *quare clausum fregit*, the defendant pleaded that A. C. was seised in fee, and, being so seised, granted a right of way by non-existing grant. The plaintiff replied, traversing the grant:—*Held*, that, on these pleadings, it was not competent for the plaintiff to give evidence to

shew that *A. C.* was not seised in fee, for the purpose of rebutting the presumption of the grant. *Cowlishaw v. Cheslyn*, 48

VIII. Information.

An information for harbouring goods, *liable to the payment of duty*, is not supported by evidence of harbouring goods, which, by reason of the packages in which the goods are imported, are *prohibited*. *Attorney-General v. Key*, 159

IX. Non est factum.

Where a party who executes a bond is at the time competent to execute it, he cannot, under the plea of *non est factum*, shew that he was misled as to the legal effect of the bond. *Edwards v. Brown*, 307

X. Statute of Limitations.

The statute of limitations must be replied specially to a plea of set-off, and cannot be taken advantage of under the general replication of *nil debet*. *Chapple v. Durston*, 1

XI. Variance.

See VARIANCE.

POLICY OF TRADE.

See TRADE.

POLICY OF INSURANCE.

See ANNUITY.

A policy of insurance was effected on goods by four specified ships, all or any of them, at and from *Sinapore, Penang, Malacca, and Batavia*, all or any, to the ships' port or ports of discharge in *Great Britain*, or to any port or ports in the United Netherlands, or to *Altona or Hamburg*,

with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the *East Indies, Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good Hope*, in port or at sea, at all times and in all places, and until safely arrived, &c., and with leave for the ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, in any direction and for any purpose, necessary or otherwise, particularly *S., P., M., B.*, the *Cape of Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation from, and without prejudice to, the assurance. The vessel, on goods by which the interest was afterwards declared to be, took on board part of her cargo at *Batavia*, and proceeded to *Sourabaya*, four hundred miles to the eastward of *B.*, and out of the course of her voyage to *Europe*, and out of her course to any of the places named in the policy. At *S.* she completed her cargo, sailed back to *B.*, and thence sailed on her voyage to a port in *Europe*, within the policy:—*Held*, that the voyage to *S.* was a voyage within the policy, that it was no deviation, and that *S.* was a loading port within the policy. *Leathly v. Hunter*, 423

POPE NICHOLAS' TAXATION.

See EVIDENCE, 10.

PRACTICE.

I. Abatement, Pleas in.

An affidavit verifying a plea in abatement, which refers to the declaration, must be sworn after the declaration is delivered, and if it be sworn before the declaration is delivered, the

plaintiff may treat the plea as a nullity, and sign judgment. *Bower v. Kemp*, 287

II. Affidavit.

See AFFIDAVIT.

III. Amendment.

See AMENDMENT.

IV. Appearance.

See REGULE GENERALES, i.

1. If the defendant do not justify his bail in due time, and *comperuit ad diem* is pleaded to a declaration on the bail bond, the Court will order the appearance of the defendant to be recorded as of the day on which the bail justified. *Ladd v. Arnaboldi*, 97

2. The appearance of a defendant in person in Court to a *subpoena* at the suit of the *Attorney-General*, may be recorded in Court, without the intervention of a clerk in court. *Attorney-General v. Carpenter*, 289

V. Arrest.

See REGULE GENERALES, xxi.

A. arrested *B.*, and died; the executors of *A.* again arrested *B.* for the same cause of action:—*Held*, that the second proceeding was not vexatious, and that the defendant was not entitled to be discharged out of custody on entering a common appearance. *Mellin v. Evans*, 82

VI. Attachment.

See REGULE GENERALES, xxi.

1. To support an attachment for the non-performance of an award on demand made by a third person who acts under a power of attorney, the

execution of the power of attorney must be shewn by the subscribing witness, and a copy of the power of attorney must be left with the party upon whom the demand is made. *Laugher v. Laugher*, 398

2. The rule for an attachment, for not accounting to the legacy office, is a rule *nisi*, which makes itself absolute by a certain day, unless in the meantime cause be shewn. *In the matter of the Estate of Vivian*, 409

VII. Attorney.

See ATTORNEY.

VIII. Bail.

See REGULE GENERALES, iii. xxi.

1. By ruling the Sheriff to bring in the body before the time for justifying bail has expired, the plaintiff does not enlarge the time for justifying bail until the expiration of the body rule, if, at the period when, independently of the body rule, the time for justification expires, he take an assignment of the bail bond; for, by so doing, he waives the body rule. *Bolland, B., dissente*. *Ladd v. Arnaboldi*, 97
But see R. M. T. 281

2. Where persons who are shewn to be bail in other actions, justify as bail by affidavit, they must swear that they are worth the sum required beyond what will satisfy their debts and their other engagements. *Henshaw v. Woolrich*, 150

3. After one successful opposition of bail, 5*l.* must be deposited with the Master, to cover the costs, before the bail can justify. *Smith v. Cooper*, 460

4. Bail who live within ten miles of the city of *London* or *Westminster*, must justify in person, and not by affidavit. *Anonymous*, 516

IX. *Costs.**See COSTS.*X. *Declaring.**See DECLARATION.*XI. *Demurrer.**See REGULE GENERALES, vi.*

1. Where a defendant demurs for delay, and there is not a sufficient number of days in the term to enable the plaintiff to conform to the usual practice in cases of demurrer, the Court will allow a *concilium* moved for on the last day but two of the term, to be drawn up for the last day of term, although no rule be given to bring in the paper books, and no paper books be in fact delivered. *Coo-per v. Hawkes*, 219

2. Before the plaintiff can move for judgment upon demurrer, the demurrer books must be delivered to all the Barons, and if the defendant do not deliver his books, the plaintiff must deliver them on his behalf. *Commelin v. Thompson*, 461

XII. *Distringas.**See DISTRINGAS.*XIII. *Ejectment.**See REGULE GENERALES, vii.*

1. A notice at the foot of a declaration in ejectment, served before term, which omits to state the term in which the tenant is to appear, is sufficient. *Doe v. Roe*, 330

2. Where a declaration in ejectment was served on the essoign day by mistake, the Court directed the rule for judgment to be served on the tenants in possession, and granted the rule for judgment against the casual ejector absolute, unless cause was shewn in five days after such service. *Doe d. Brent v. Roe*, 483

XIV. *Extent.**See EXTENT.*XV. *Judgment as in Case of Nonsuit.*

1. In a country cause, where issue is joined in *Michaelmas* Term, and the plaintiff does not proceed to trial at the Assizes after *Hilary* Term, the defendant may, in *Easter* Term, move for judgment as in case of a nonsuit. *Crowley v. Dean*, 18

See Spiers v. Parker, *Ibid.* n.

2. Where issue is joined in an issuable term in a country cause, and no notice of trial is given for the ensuing Assizes, the defendant cannot move for judgment as in case of a nonsuit, until the term next after the second Assizes. *Simons v. Folkenham*, 513

XVI. *New Trial.*

1. Where the plaintiff has died after verdict, the Court may grant a new trial on the application of the defendant, and would, in such case, impose terms on him to prevent his taking advantage of the plaintiff's death. *Griffith v. Williams*, 47

2. By the practice of this Court, where a new trial is granted, the party who succeeds upon both trials is entitled to the costs of both trials, if the rule for the new trial is silent upon the subject of costs. *Loader, qui tam, v. Thomas*, 54

3. Where a cause is tried at the sittings in term, a motion may be made for a new trial, at any time within four days after the return of the *distringas*, although more than four days have elapsed since the trial. *Mason v. Clarke*, 411

4. Upon an application by a defendant for a new trial, the Court will refuse it if there be an essential defect in the defendant's evidence, although no objection was made by the plaintiff at the trial upon that point. *Davies v. Morgan*, 587

XVII. *Notice of Trial.*

See *REGULÆ GENERALES*, XX.

XVIII. *Pleading.*

1. A defendant to an information may plead in person in Court. *Attorney-General v. Carpenter*, 409

2. A declaration in debt demanded 60*l.*, and contained six counts for 10*l.* each; and the defendant pleaded that he did not owe the said sum of 10*l.* above demanded. The plaintiff treated this plea as a nullity, and signed judgment. The Court set the judgment aside. *Risdale v. Kelly*, 410

XIX. *Prisoner.*

See *PRISONER*.

XX. *Process.*

See *PROCESS*.

XXI. *Removal of Causes.*

See *WALES*.

An action of debt, for the penalty of 50*l.*, (given by the statute 32 *Geo.* 2, c. 28, for carrying a prisoner to gaol, on an arrest within twenty-four hours), against a revenue officer, acting under a warrant granted to him by the Sheriff, by the directions of the solicitor of Excise, pursuant to the statute 7 & 8 *Geo.* 4, c. 53, s. 95, and founded upon an attachment for not appearing to an information filed in this Court for smuggling, may be removed from the Court of *Common Pleas* into the office of pleas of this Court. *Siddon v. East*, 12

XXII. *Special Paper.*

When taken, 467

XXIII. *Special Verdict.*

The Attorney-General is not entitled, by virtue of his office, to turn a

special case, reserved upon an information, into a special verdict. *Attorney-General v. Dimond*, 371

XXIV. *Venire.*

See *DISTRINGAS*.

XXV. *Venue.*

1. The rule to change the *venue* is, in this Court, a rule nisi, which makes itself absolute, unless cause be shewn on or before the day mentioned in the rule; and affidavits sworn after that day cannot be used to shew cause. The *venue* can be brought back to the original county in which it was laid, only upon an undertaking to give material evidence in that county. *Bagnall v. Shipham*, 377

2. The *venue* in an action upon an I. O. U. may be changed, upon the usual affidavit. *Roberts v. Wright*, 547

XXVI. *Wales.*

See *WALES*.

PRÆCIPE.

See *REGULÆ GENERALES*, XV.

PREROGATIVE.

See *SPECIAL VERDICT*.

An action of debt, for the penalty of 50*l.*, (given by the statute 32 *Geo.* 2, c. 28, for carrying a prisoner to gaol, on an arrest within twenty-four hours), against a revenue officer, acting under a warrant granted to him by the Sheriff by the directions of the solicitor of Excise, pursuant to the stat. 7 & 8 *Geo.* 4, c. 53, s. 95, and founded upon an attachment for not appearing to an information filed in this Court for smuggling, may be removed from the Court of *Common Pleas* into the office of pleas of this Court. *Siddon v. East*, 12

PRIVILEGE.

PRESUMPTION.

See EVIDENCE, 4.

PRINCIPAL AND AGENT.

See MASTER & SERVANT.

STOPPAGE IN TRANSITU.

Where *A.*, being indebted to *B.*, gave him for security a delivery order for goods in the hands of a wharfinger, which the wharfinger accepted, and afterwards *A.*, being indebted to *C.*, gave him another delivery order for the same goods, which was taken to the wharfinger, who said that he could not transfer the goods, as he held them for *B.*, but that if *C.* could get *B.*'s order he would transfer them, and promised that he would not give up the goods without first letting *C.* know; and afterwards *B.*, his debt remaining unsatisfied, gave a delivery order for the same goods to *A.*, who gave notice of it to the wharfinger:—*Held*, that *C.* had no property upon which trover could be maintained against the wharfinger. *Melling v. Kelshaw*, 184

PRINCIPAL AND SURETY.

See BOND.

COVENANT, iii.

PRISONER.

Where a defendant is in custody in the county of *A.*, upon an attachment issuing out of this Court, he may be removed to the county of *B.*, to take his trial upon an indictment found in the latter county. *Re Welton*, 459

PRIVILEGE.

A clerk in court in the *Exchequer*, suing, with a person not entitled to *Exchequer* privilege, by *capias* of privilege, an attorney of the King's

PROCHEIN AMY. 623

Bench, does not lose his privilege. *Elkins v. Harding*, 345
And see *Burn v. Pasmore*, 346, n.

PROBATE DUTY.

Probate duty is not payable in respect of property in a foreign country belonging to a testator dying in this country, although the property be brought into and administered in this country by the executor. *Attorney-General v. Dimond*, 356

PROCESS.

See DISTINGUAS.

REGULE GENERALES, xvi. xxi.

1. The plaintiff, having sued out a *quo minus* against one defendant, and a *venire* against the other, and separate appearances having been entered, and separate rules to declare given, declared *jointly* against both:—*Held*, that the declaration was regular. *Pitt v. Wilks*, 388

2. The *teste* of a writ, if irregular in naming a late Chief Baron, instead of the existing Chief Baron, may be amended, even after a rule to set it aside upon that ground; and upon the amendment being made, the rule will be discharged. *Wakeling v. Watson*, 467

3. A *subpoena*, tested the 9th *May*, and served on the 19th, required the defendant to appear "on *Monday*, the 21st day of *March instant*:"—The Court refused to set aside the service. *Page v. Carew*, 514

4. The rule of Court, which requires the day of the month and year to be indorsed on the process, is merely directory; and the Court will not set aside the service of process, because there is no such indorsement upon it. *Millar v. Bowden*, 563

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II. Submission by.

The condition of a recognizance to abide the award of *D.* cannot be varied by a rule of Court substituting *M.* for *D.* *Rex v. Bingham*, 245

III. Costs in Scire Facias on.

1. Upon a *scire facias* upon a recognizance entered into to abide an award respecting matters in difference upon an extent in aid:—*Held*, that the defendant, having succeeded upon demurrer, was not entitled to costs. *Rex v. Bingham*, 379

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An action of debt, for the penalty of 50*l.*, (given by the statute 32

SCIRE FACIAS. 625

Geo. 2, c. 28, for carrying a prisoner to gaol, on an arrest within twenty-four hours), against a revenue officer, acting under a warrant granted to him by the Sheriff by the directions of the solicitor of Excise, pursuant to the statute 7 & 8 *Geo.* 4, c. 53, s. 95, and founded upon an attachment for not appearing to an information filed in this Court for smuggling, may be removed from the Court of *Common Pleas* into the office of pleas of this Court. *Siddon v. East*, 12

REMOVAL OF PRISONER.

See PRISONER.

REQUESTS, COURT OF.

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SETTLEMENT.

See MARRIAGE SETTLEMENT.

SHERIFF.

See COVENANT, iii.

EXECUTION.

A Sheriff cannot retain against the Crown a sum of money deposited by an agent of the Crown, to cover the expenses of a sale by auction of property seized under an extent, and sold under a *venditioni exponas*. *Rez v. Jones*, 140

SHIP.

See CHARTER-PARTY.

MASTER & SEAMAN.

SLANDER.

1. Where a count for slander, after alleging that the plaintiff was a livery stable keeper, and was about to prove a debt under a commission of bankrupt, stated that the defendant spoke of and concerning the plaintiff, and of and concerning the matter in that count mentioned, and of and concerning the plaintiff in his trade, these words—"you are a regular prover under bankruptcy (meaning that the plaintiff *was accustomed to prove fictitious debts under commissions of bankrupt*), you are a regular bankrupt maker:"—*Held*, that the count could not be maintained; for the words were not actionable as spoken of the plaintiff in his trade; nor were the words as laid actionable, as imputing a crime punishable by law, because

the *innuendo* was broader than the meaning of the words, which were unexplained by prefatory averment, and did not of themselves necessarily import a crime. *Alexander v. Angle*, 143

2. Words to be actionable as spoken of a man in his office must be spoken of him in reference to his character or conduct in such office, and must impute to him the want of some qualification for, or misconduct in, his office. *Lumby v. Allday*, 301

3. Where, therefore, a declaration stated that the plaintiff was clerk of a gas company, and that the defendant spoke of him these words: "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores," &c.:—*Held*, that the words were not actionable. *Ibid*.

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SPECIAL VERDICT.

The Attorney-General is not entitled, by virtue of his office, to turn a special case reserved upon an information into a special verdict. *Attorney-General v. Dimond*, 371

STATUTE.

See HEIR & ANCESTOR.

PLEADING, vii.

STATUTE OF FRAUDS.

See ATTORNEY, i. 2.

1. A contract to let furnished lodgings is a contract for an interest in land within the fourth section of the statute of frauds. *Edge v. Strafford*, 391

2. The effect of the first, second, and fourth sections of the statute of

STOPPAGE IN TRANSITU.

frauds, as far as they apply to parol leases not exceeding three years, is, that the leases are valid, and that whatever remedy can be had upon them in their character of leases may be resorted to, but they do not confer the right to sue the lessee for damages for not taking possession. *Ibid.*

3. A guarantie in the following form—"R. R., plaintiff, and J. A., defendant: We, the undersigned, jointly and severally undertake and agree to pay G. C. C., gent., the debt and full costs in this action, provided on or before the 1st day of Jan. 1831, a sum of 11*l.* 10*s.* 3*d.* be not paid to him the said G. C. C. at his office, as the attorney for the plaintiffs. Dated this sixth day of Nov. 1830," and containing in the margin the following letters and figures:—"Debt 6*l.* 11*s.* 11*d.*, costs 4*l.* 18*s.* 4*d.*; 11*l.* 10*s.* 3*d.*" does not shew a sufficient consideration to take it out of the 4th section of the statute of frauds, and consequently no action can be maintained thereon. *Cole v. Dyer*, 461

STATUTE OF LIMITATIONS.

The statute of limitations must be replied specially to a plea of set-off, and cannot be taken advantage of under the general replication of *nil debet*. *Chapple v. Durston*, 1

STOPPAGE IN TRANSITU.

The agent of a bankrupt who has made himself responsible for the price of goods, may stop them *in transitu*. But if, after they have reached a certain place, he give them a new destination in furtherance of the bankrupt's business, and in the course of the bankrupt's trade, when they arrive at the place of such destination, they vest in the bankrupt, and pass to his assignees. *Hawkes v. Dunn*, 519

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SUBPCENA.

See *REGULE GENERALES*, xxi.

SUNDAY.

See *BILLS & NOTES*, 1.
ESSEIGN DAY.

TESTE.

See *PROCESS*.

TITHES.

1. The word "tithes," in ancient documents, does not necessarily import, that tithes were then payable in kind, but may mean a money payment in lieu of tithes. *Beck v. Bree*, 246

2. Where, upon an issue upon a district modus, the plaintiff clearly proved the existence for 150 years of the payment pleaded, and the defendant produced Pope *Nicholas'* taxation, and other documentary evidence, which ascribed to the rectory, and to the property in respect of which the modus was pleaded, values inconsistent with the alleged modus:—*Held*, after verdict for the plaintiff, that it was for the jury to say to what weight the documentary evidence was entitled, and that they might take into their consideration whether the documentary evidence ascribed to the rectory and the district their real value at the time. *Ibid.*

3. The tenth calf in the order of birth is the tithes calf, where the order of birth can be ascertained. *Tratman v. Carrington*, 320

TOLL.

A grant of a fair or market, with an express grant of toll, passes reasonable toll, though no amount of toll be specified. *Corporation of Stamford v. Pawlett*, 57
Affirmed, 400

TRADE.

By an agreement reciting that *A. B.* and *C. D.* had, for some time past, employed, and then did employ *E. F.* in executing the orders which they from time to time received; and also reciting that *A. B.* and *C. D.* had requested *E. F.* to enter into an agreement to work in his trade or business, and to execute the orders of *A. B.* and *C. D.*, in manufacturing and making goods in the way of his trade, for the said *A. B.* and *C. D.* alone, to which he had consented, in consideration of his past employment, and also of the undertaking of *A. B.* and *C. D.* to continue to employ him as *theretofore*;—*A. B.* and *C. D.* agreed with *E. F.*, that they would, during the joint lives of themselves and *E. F.*, continue to employ him in executing their orders as *theretofore*, and upon the like or other usual terms, subject, nevertheless, to the provisos and agreements thereafter mentioned; and *E. F.* agreed with *A. B.* and *C. D.* that he would, during the joint lives of *A. B.* and *C. D.*, work for and execute their orders for them as he had been accustomed in his trade or business, in a good and workmanlike manner, and at general and proper prices or terms; and that he would not at any time work for, or execute or cause to be executed, the orders of any person or persons whomsoever, in his trade or business, without the consent in writing of *A. B.* and *C. D.*, which consent should be necessary upon every distinct occasion, and should contain the address of the person or persons for whom he might thereby be permitted to be employed, and also the specific work which he was thereby permitted to perform: but it was provided and agreed, that in case *A. B.* and *C. D.* should at any time be desirous to put an end to that agreement, and should give, or cause to be given, at least three months' no-

tice in writing to *E. F.*, the agreement should be considered as at an end and determined: provided also, that in case the said *A. B.* and *C. D.* should at any time have occasion or be under the necessity, by reason of the urgency or extent of orders, or *should otherwise think fit*, they should be at liberty to employ any other person or persons to execute orders for them in the trade or business of *E. F.*; and that, without thereby releasing *E. F.* from his agreement therein contained of exclusively working for the said *A. B.* and *C. D.*; and it was provided that nothing therein contained should be taken to restrain or prevent *E. F.* from executing the orders of any person or persons residing in the city of *London*, or within six miles thereof:—*Held*, first, that this agreement, being in partial restraint of trade, and not having an adequate consideration to support it, was void.—And secondly, that a promissory note given by *E. F.* to *A. B.* and *C. D.* in consideration of breaches of the agreement, in working for other persons, was also void, and could not be set off by *A. B.* and *C. D.* in an action against them, at the suit of the assignees of *E. F.*, for work done. *Young v. Timmins*, 331

TROVER.

See ACTION, 4.

CONVERSION.

USE AND OCCUPATION.

A tenant who agrees to take furnished lodgings, but does not enter, is not liable in an action for use and occupation. *Edge v. Stafford*, 391

USURY.

The grant of an annuity for the term of four lives, and the lives and life of the survivors and survivor,

contained a covenant by the grantor, within thirty days after the decease of the third life which should drop, to insure 1000*l.*, (the amount of the consideration), in some insurance office, for the use of the grantee, to be paid on the decease of such survivor:—*Held*, not usurious. *Holland v. Pelham*, 575

VARIANCE.

1. Declaration alleged, that the plaintiff was possessed of a messuage &c., belonging to and supporting which there were certain foundations, which the plaintiff had enjoyed, &c., and ought, &c., to enjoy. On evidence, it appeared, that the plaintiff was only entitled to an easement in the foundations which belonged to the defendant:—*Held*, no variance. *Brown v. Windsor*, 20

2. Information for offering a bribe to *Thomas Dabbs*, a custom-house officer. Evidence that his name of baptism was *Thomas Tyrrel Dabbs*, in which name his commission was made out, but that he was as well or better known at the custom-house and in the trade by the name of *Thomas Dabbs*, which name he himself generally used:—*Held*, no variance. *Attorney-General v. Hawkes*, 121

3. Where an information charged an importation of bugles, and it was doubtful whether the articles imported were beads or bugles, upon which different duties were payable, but they were treated at the custom-house and in the trade as bugles, and the defendant himself had treated them as such:—*Held*, no variance. *Ibid.*

VENDITIONI EXPONAS.

See SHERIFF.

VENIRE.

See DISTINGAS.

VENIRE DE NOVO.

See COSTS, iii.

VENUE.

I. Changing.

1. The rule to change the *venue* is, in this Court, a rule *nisi*, which makes itself absolute, unless cause be shewn on or before the day mentioned in the rule; and affidavits sworn after that day cannot be used to shew cause. *Bagnall v. Shipham*, 377

2. The *venue* in an action upon an I. O. U. may be changed, upon the usual affidavit. *Roberts v. Wright*, 547

II. Retaining.

The *venue* can be brought back to the original county in which it was laid, only upon an undertaking to give material evidence in that county. *Bagnall v. Shipham*, 377

WALES.

REMOVAL OF CAUSES, 282—285

1. The Court of *Exchequer* cannot order judgment to be entered up in that Court on a warrant of attorney to confess judgment in the Great Sessions in *Wales*, given previously to the stat. 1 *Wm.* 4, c. 70. *Williams v. Williams*, 387

2. The late Court of Great Sessions for the county of *Chester*, at the summer sessions, 1830, issued an attachment returnable at the next Great Sessions against the attorney in a cause for nonpayment of the defendant's costs. Before the next Great Sessions, the act abolishing the Court (11 *Geo.* 4 and 1 *Wm.* 4, c. 70) came into operation; but, previously to that time, the Sheriff had taken a bail bond for the appearance of the attorney, pursuant to the attachment. The Sheriff being ruled in the *Easter Term* following to return the writ into the

Court of *Exchequer*, returned *cepi corpus*, and that he was ready to have had his body before the Justices of *Chester* at the return; but that, before the return, the Court was abolished:—*Held*, that the return was insufficient, and that the application against the Sheriff in *Easter Term* was in time. *Jones v. Clarke*, 447

WARRANT OF ATTORNEY.

See WAILES, 1.

WHARFINGER.

See PRINCIPAL & SURETY.

WITNESS.

See COMMISSION.
EVIDENCE, 5.

1. Upon the trial of an ejectment, the landlord (defendant) proposed to

call the tenants in possession of different parts of the property, upon whom ejectments had been served, to prove an adverse possession; but they were held to be incompetent: and the Court refused to enter into the question, whether they were competent to prove the possession of each other, because the distinction had not been pointed out at the trial, but intimated an opinion that they were not competent for any purpose. *Doe d. Lewis v. Preece*, 515

2. Corporators are not competent witnesses in support of a custom to exclude foreigners. *Davies v. Morgan*, 587

WORDS.

See SLANDER.

WRIT.

See PROCESS.

END OF VOL. I.

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